No. 2222

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

JOHN C. LEONARD,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon

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TRANSCRIPT OF RECORD.

Records of U.S. Circuit Court of Appeals
794

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A. D. DANIELS,

Appellant,

vs.

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Appellee.

Names and Addresses of Attorneys Upon This Appeal:

For the Appellant:

PLATT & PLATT and HUGH MONTGOMERY,
Board of Trade Bldg., Portland, Oregon

For the Appellee:

J. H. CARNAHAN,

Klamath Falls, Oregon.

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In the District Court of the United States for the District of Oregon.

Be it Remembered, That on the 4 day of May, 1912, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Bill of Complaint, in words and figures as follows, to wit:

[Amended Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JOHN C. LEONARD,

Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON:

A. D. Daniels, a citizen and inhabitant of the State of Wisconsin, residing at Rhinelander in said state, with leave of court first had and obtained, brings this, his amended bill of complaint, against John C. Leonard, a resident and inhabitant of the State of Oregon, residing at Klamath Falls in said state.

And thereupon your orator complains and says:

I.

That at all times herein mentioned plaintiff was and is a resident and inhabitant of the State of Wisconsin, residing at Rhinelander in said state.

II.

And thereupon your orator further shows unto your Honors:

That at all times herein mentioned defendant, John C. Leonard, was, and is, a resident and inhabitant of the State of Oregon, residing at Klamath Falls in said state.

III.

And thereupon your orator further shows unto your Honors:

That on the 12th day of April, 1902, and immediately prior thereto, one Edward B. Perrin was the owner in fee simple, free of any lien or insumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to-wit:

> The southeast quarter of the southwest quarter of section one, and the south half of the southwest quarter and the north half of the northwest quarter, section nine, and the north half of the southeast quarter and the south half of the northeast quarter, and the north half of the southwest quarter, section eleven, and the north half of the southwest quarter and the south half of the northwest quarter, section thirteen, and the south half of the southeast quarter, section nineteen, and the north half of the northwest quarter and the north half of the southeast quarter and the south half of the southwest quarter and the south half of the northeast

quarter, section twenty-one, and the south half of the southwest quarter, and the south half of the northeast quarter, section twenty-three, and the north half of the northeast quarter and the north half of the southwest quarter, section twenty-nine, township twenty-three north, range four east G. & S. R. M., Arizona,

and was the owner in fee simple of said property described in paragraph III of this amended complaint, up until the 2nd day of February, 1904.

IV.

And thereupon your orator further shows unto your Honors:

That on or about the 12th day of April, 1902, the said described lands, mentioned in paragraph III of this amended bill of complaint, were included within the limits of the San Francisco Mountains Forest Reserves, pursuant to a proclamation of the President of the United States made on or about the 12th day of April, 1902, which said lands were then, and still are, non-mineral lands.

V.

And thereupon your orator further shows unto your Honors:

That on or about the 8th day of February, 1904, that certain property situated within the District of Oregon, located in the County of Klamath in the State of Oregon, and particularly described as follows, to-wit:

Lot three, section three, township thirty-seven south, range ten east of the Willamette Meridian,

was surveyed, unappropriated, and vacant public land of the United States, returned and characterized upon the official records of the United States as non-mineral land, free and open to entry and settlement under and in accordance with the laws of the United States governing the acquisition of public lands.

VI.

And thereupon your orator further shows unto your Honors:

That on or about the 4th day of June, 1897, the Congress of the United States passed an act entitled: "An act making appropriation for sundry civil expenses of the government, for the fiscal year ending June 30, 1898, and for other purposes:" which act provides, among other things, as follows, to-wit:

"That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected: Provided further, That in cases of unperfected claims the require-

ments of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

VII.

And thereupon your orator further shows unto your Honors:

That on or about the 2nd day of February, 1904, the said Edward B. Perrin, did, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, relinquish and convey unto the United States of America those certain tracts of land hereinbefore described in paragraph III of this amended complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the said lands are situated, and subsequently, and on the 8th day of February, 1904, filed with the Register and Receiver of the United States land office at Lakeview, Oregon, the said deed so recorded, together with a full, true and correct abstract of title of the lands so relinquished, duly certified as such by the country recorder of the county in which the lands are situated, which abstract of title showed him to be the owner in fee simple of said lands, free and clear of any lien or incumbrances, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relinquished.

Lot three, section three, township thirty-

seven south, range ten east of the Willamette Meridian,

together with other lands, which selection so made was prior in time to the selection or entry of any other person or persons whomsoever, and, by virtue of said selection, there was initiated a right and interest prior in time and superior in right as against all persons whomsover.

VIII.

And thereupon your orator further shows unto your Honors:

That regardless of said selection so made as alleged in paragraph VII of this amended complaint, the defendant did, on January 9, 1905, attempt to make a homestead entry upon the land described in paragraph VII of this amended complaint.

IX.

And thereupon your orator further shows unto your Honors:

That on or about the 28th day of June, 1902, the state of Oregon filed upon the said tract so selected, together with certain other lands, certain instruments purporting to be school indemnity lists, which lists were numbered lists 178 and 188, respectively, which said lists were duly and regularly accepted and filed by the Register and Receiver of the United States land office at Lakeview, Oregon, and thereupon were regularly transmitted to the Commissioner of the General Land Office of the United States government at Washington, D. C., to await the acceptance and approval of the land department of the United

States government, but that, owing to the invalid character of the base lands tendered in said lists, the said lists were held for cancellation, and were subsequently cancelled upon relinquishments of said lists filed on behalf of the state of Oregon, on the 8th day of February, 1904.

X.

And thereupon your orator further shows unto your Honors:

That prior to the said cancellation of said school indemnity lists 178 and 188, and before any action whatsoever had been taken by the proper officers of the land department of the United States, except said Register and said Receiver, relative to the acceptance and rejection of the said indemnity lists, the state of Oregon, acting through the officers of the Oregon state land board, sold to various bona fide purchasers, for value, the timber lands upon which the said school indemnity lists 178 and 188 had been filed, and the said state had not at the time of such sale, nor has it at any time since, ever acquired or owned any right, title, or interest in or to the said lands upon which the said lists were filed, including those lands more particularly described in paragraph V of this amended bill of complaint, which said lands described in said paragraph V were, for a valuable consideration, and in good faith, and without any knowledge whatsoever of the irregularity of the proceedings which had taken place in connection with the sale thereof, or of the invalid character of the base lands which were tendered to the Federal government as the basis for the

said selection by the State of Oregon, purchased from the said State of Oregon by the plaintiff herein.

XI.

And thereupon your orator further shows unto your Honors:

That subsequently and upon the discovery of the fact that all the proceedings in connection with the attempt to acquire said lands by filing of said lists 178 and 188, so filed as aforesaid, and more particularly those lands hereinbefore described in paragraph V of this amended bill of complaint, were irregular, and that by virtue of the filing of said lists the State of Oregon had acquired no interest and did not then have any right, title, or interest in or to the said lands so selected, owing to the invalid characted of the base land which had been tendered in exchange therefor, and the further fact that the said selected land had, nevertheless, been sold by the State of Oregon to many innocent purchasers for value, the State of Oregon, acting through the Honorable George E. Chamberlain, its governor, entered into negotiations with the Department of the Interior of the United States, for the purpose of arriving at some arrangement wherein and whereby the interest of these bona fide purchasers from the state might be protected, and as a result of such negotiations, and on or about the 17th day of October, 1903, a letter was promulgated and transmitted to the governor of the State of Oregon by the Honorable Secretary of the Interior of the United States, of which letter the following is in part substantially a copy, to-wit:

"It (the state) may within sixty day allowed for appeal amend its selection by the substitution of a valid base, or, if unable to furnish such a base, it may, upon recipt of notice that the selection is held for cancellation, make a formal delinquishment of the selection, and give same to its grantee. While the selection is of record uncancelled the land is segregated thereby, and no right can be acquired by the presentation of an application therefor (*29* L. D. *29*), but the purchaser holding the state's relinquishment may present it with his application, and thereby secure the right of entry."

XII.

And thereupon your orator further shows unto your Honors:

That thereafter and in accordance with the terms of the arrangement thus agreed upon, as evidenced by the said letter of the Secretary of the Interior, the said lieu selection so made as alleged in paragraph VII of this amended bill of complaint, was made by the said Edward B. Perrin, by P. S. Brumby, his attorney in fact, in the interest and for the benefit of the plaintiff herein, and for the purpose of protecting the interests of the plaintiff in and to said selected land acquired by virtue of the purchase so made by the plaintiff from the state of Oregon, as alleged in paragraph X of this amended complaint, and at the time of making said lieu selection so made as alleged in said paragraph VII, and on the 8th day of Febru-

ary, 1904, the said lieu selector, the said Edward B. Perrin, by P. S. Brumby, his attorney in fact, presented, simultaneously with and together with the selection as in paragraph VII of this amended complaint alleged, a relinquishment from the State of Oregon, of all its right, title and interest in and to the said selected land, which said relinquishment was made by the state of Oregon in the interest and for the benefit of the plaintiff herein, as grantee, which relinquishment is the same relinquishment referred to in paragraph IX hereof.

XIII.

And thereupon your orator further shows unto your Honors:

That the said forest lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, was in all respects regular and in accordance with the requirements of said Act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, and in accordance with the requirements of the Secretary of the Interior in his letter of October 17, 1903, hereinbefore set forth in paragraph XI of this amended bill of complaint, and the local officers of the United States land office in Lakeview, Oregon, did, on the 8th day of February, 1904, accept and file the said lieu selection, so made as aforesaid in paragraph VII of this amended bill of complaint, and did, on the 4th day of March, 1904, and at subsequent dates, attempt to reject said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, and stated, as a basis for said attempted rejection, that the

said lieu selection was in conflict with certain homestead and timber and stone applications, which were made subsequently to the 8th day of February, 1904, and subsequently to the presentation and filing of the lieu selection, together with the relinquishment of the State of Oregon, as alleged in paragraphs VII and XII of this amended bill of complaint.

XIV.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 8th day of April, 1904, said lieu selector and the plaintiff herein, together with other lieu selectors who had made other selections in the interest and for the benefit of the plaintiff herein, appealed from the ruling of the local officers of the United States land office at Lakeview, Oregon, by which ruling the said local officers attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, upon which appeal the said ruling was affirmed by the Commissioner of the General Land Office at Washington, D. C., on or about the 30th day of March, 1905, and subsequently, and on or about the 25th day of October, 1905, the Honorable Secretary of the Interior of the United States, acting through the Honorable Frank Pierce, first assistant secretary, reversed the said decision and ruling of the Commissioner of the General Land Office, and directed that said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections similarly made, be allowed as of the

date on which they were filed, to-wit, the 8th day of February, 1904, and directed the Register and Receiver of the United States Land Office at Lakeview, Oregon, to allow said selections to remain of record as filed.

XV.

And thereupon your orator further shows unto your Honors:

That sebsequently and on or about the 6th day of December, 1905, the local officers of the United States Land Office at Lakeview, Oregon, attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections, and alleged as a ground for said attempted rejection that the land covered by said selections had been withdrawn for the purpose of what was known as the Klamath River Project, and said action of the said Register and Receiver of the United States Land Office at Lakeview, Oregon, in attempting to reject said selections, was subsequently reversed by order and direction of the Commissoner of the General Land Office, made on the 23rd day of January, 1906, who ordered and directed that said lieu selection be allowed as of date February 8, 1904.

XVI.

And thereupon your orator further shows unto your Honors:

That on or about the 5th day of March, 1906, and the 11th day of June, 1906, the Register and Receiver of the United States Land Office at Lakeview, Ore-

gon, made objections to the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, and attempted thereby to reject said lieu selection referred to in paragraph VII of this amended complaint, which attempted objections were sustained on appeal by the Commissioner of the General Land Office and by the Department of the Interior, on the 20th day of June, 1906, and subsequently and on or about the 15th day of May, 1907, the Department of the Interior of the United States recalled its attempted decision of June 20, 1906, and entered an order directing the allowance of the said lieu selection, so made as alleged in paragraph VII of this amend complaint, together with other selections, as of the date on which said lieu selections were filed, to wit, the 8th day of February, 1904, and ordered and directed that notice of such order be given to all parties who had made entries upon said lands subsequently to the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, which said notice was duly given as directed.

XVII.

And thereupon your orator further shows unto your Honors:

That subsequently, and as a result of the notice so given, a petition for a review of the departmental decision last referred to was filed on behalf of Archie Johnson, a claimant of part of the said lands embraced by said indemnity lists 178 and 188, which petition set forth the existence of an alleged conspir-

acy, averred to have been formed for the purpose of acquiring all of the said lands, in the first instance, and that the said lieu selections, so made as aforesaid, were in accordance with, and constituted a part of, said alleged conspiracy, and that the plaintiff herein was not a purchaser in good faith of said land described in paragraph V of this amended complaint, or any part thereof, which petition for review was allowed, upon the ground that all previous hearings before the Department of the Interior, so had as hereinbefore alleged, were purely ex parte and were, consequently, not proper proceedings in which to determine the merits of the adverse claims to the lands in question, for the purpose of basing a final decision thereon, and, therefore, an order was made directing that a final hearing should be held before the Register and Receiver of the United States land office at Lakeview, Oregon, for the purpose of determining the respective merits of various claims to the lands embraced within the said school indemnity lists 178 and 188.

XVIII.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 25th day of May, 1908, said hearing so ordered, as aforesaid, was duly and regularly had before the Register and Receiver of the United States land office at Lakeview, Oregon, the plaintiff herein appearing in person and by attorneys, and the defendant and other adverse claimants appearing in person or by attorneys, at which time the said Register and Receiver, after duly

hearing the respective parties, attempted to hold that the various homestead and timber and stone entries hereinbefore referred to in paragraph XIII of this amended complaint and particularly the entry of the defendant which was made on the 9th day of January, 1905, should be allowed, which decision was subsequently, and on or about the 13 day of April, 1909, reversed by the Honorable Commissioner of the General Land Office, who held that the lieu selection referred to in paragraph VII of this amended complaint, together with other selections made in the interest of the plaintiff herein, had been duly and regularly made, and should be allowed to remain intact, upon the records of the United States Land Office, as of the date on which they were filed, to wit, February 8, 1904.

XIX.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the ..... day of ....., 19....., an appeal from the decision of the Honorable Commissioner of the General Land Office, hereinbefore referred to in paragraph XVIII of this amended complaint, was taken by certain alleged homestead and timber and stone claimants, including defendant, to the Department of the Interor of the United States, which department, acting through the Honorable Frank Pierce, its First Assistant Secretary, found that the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, were filed

simultaneously with the relinquishment and cancellation of said indemnity lists 178 and 188, to wit, on the 8th day of February, 1904, and before the attempted filing of the said alleged homestead and timber and stone entries, so made as alleged in paragraphs VIII and XIII of this amended complaint, and further found that the record then before said department fully showed, and every material fact supported the conclusion, that the plaintiff herein was a purchaser in good faith, free from fraud of any kind, and that the said alleged somestead and other entries, and particularly the entry of the defendant, were made subsequently to the 8th day of February, 1904, and after the filing of the lieu selection, so made as alleged in paragraph VII of this amended complaint, and that said lieu selection, so made as alleged in paragraph VII of this amended complaint, had been allowed by the Secretary of the Interior, as alleged in paragraphs XIV and XVI of this amended complaint, and had been allowed by the Commissioner of the General Land Office, as alleged in paragraph XV of this amended complaint, and, based upon said findings, held that it was within the competency of the officers of the land department of the United States to allow the said alleged homestead and timber and stone entries to be made after the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, and the allowance of said selections, so made as alleged in paragraphs XIII and XIV and XV of this amended complaint, and further held that said lieu selections, so made and allowed, would

be denied in all instances where the local officers of the United States Land Office at Lakeview, Oregon, had attempted to allow homestead and timber and stone entries to be made, a copy of which decision is hereunto attached and marked "Exhibit A," and, by reference, incorporated in and made a part of this amended complaint.

XX.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 7th day of December, 1911, and in accordance with the ruling of the decision hereinbefore referred to in paragraph XVI of this amended complaint, a patent to the following described land, situated in the county of Klamath and State of Oregon, and particularly described as follows, to-wit:

> Lot three, section three, township thirty-seven south, range ten east of the Willamette Meridian,

was issued in the name of John C. Leonard, the defendant herein, contrary to, and in violation of, the rights and equities of the plaintiff herein, and that the said patent so issued, as aforesaid, was issued by the officers of the United States government without regard to, and in contravention of, the vested rights of the plaintiff herein, and in accordance with the ruling of the Department of the Interior, as evidenced by the decision referred to in paragraph XIX of this amended complaint.

XXI.

And thereupon your orator further shows unto

your Honors:

That this is a suit between citizens of different states, and that the amount in controversy herein exceeds the amount of three thousand ($3000) dollars, exclusive of interest and costs.

XXII.

And thereupon your orator further shows unto your Honors:

That he has no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, and forasmuch as your orator is remediless in the premises, under and by strict rules of common law, and can only have relief in a court of equity where matters of this nature are recognizable and reviewable, files this, his amended bill of complaint, and prays:

I. That the defendant may be adjudged and decreed to hold said land described in paragraph V in trust for your orator, and to convey the same to your orator, and deliver to your orator any patent or other deeds of the same in his possession, and be restrained and enjoined from hereafter setting up any claim or title to said land, or any part thereof, or in any manner intermeddling therewith, or removing any timber or other product therefrom.

II. That the defendant may be adjudged and decreed to hold any timber or other product by him or his servants or agents removed from said land, or the proceeds or manufactured product from the same, in trust for your orator, and may be decreed to account to your orator for the same, or the value thereof, and

to repay to your orator said value, with interest from the date of sale, if the same has been sold by the said defendant.

III. That upon the failure of the defendant to make said conveyance and to deliver to your orator any patent or other deeds of the said land described in paragraph V, within a period of thirty days from the entry of the decree of this court, the said decree be adjudged and decreed to stand as a conveyance in lieu of such patent or other deeds.

IV. And your orator further prays: That your Honors may grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this Honorable Court, directed to the defendant, John C. Leonard, therein and thereby commanding said defendant, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer, all and singular, (but not under oath, answer under oath being expressly waived), the matters and things aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

V. And your orator prays for such further relief in the premises as the nature and circumstances of this cause may require and to your Honorable Court may seem reasonable and proper.

And your orator, as in duty bound, will ever pray.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, His Solicitors.

Hugh Montgomery,
of Counsel.

[Exhibit "A"]

D. C. M. G. B. G.

DEPARTMENT OF INTERIOR.

Washington, Feb. 17, 1910.

E--900.

Aztec Land & Cattle Company, Lt'd.
E. B. Perrin
Lieu Selectors,
A. D. Daniels,
Claimant of Beneficial Interest,
vs.
Archie Johnson, et al,
Intervenors.
The Commissioner
Of the General Land Office.

Sir:

This is the appeal of Archie Johnson, et al., intervenors, from your office decision of April 13, 1909, sustaining the claim of A. D. Daniels, beneficiary under Lieu Selections, Nos. 15016, 15017 and 18, (Serials 0714, 0715, 0716) for certain described lands in the Lakeview Land District, Oregon. Questions affecting the validity of these selections have been subject of numerous decisions of the Land Department, and a detail statement of such proceedings covering a period of more than eight years, must of necessity be set out

in detail, if the issues now presented may be properly understood.

January 28, 1902, the lands involved were selected by the State of Oregon, per school indemnity lists Nos. 178 and 188 these lists were held for cancellation by your office, because of invalid base, and were finally cancelled in March and August, 1904, upon relinquishments filed on behalf of the state. The date of the filing of these relinquishments is one of the disputed questions in this record: and while not necessarily controlling, it is in view of this case important, and will be considered on its merits in the progress of this paper.

For present statement, it will be enough to say that the local officers and your office have found that it was filed Feb. 10, 1904, whereas it is claimed on behalf of A. D. Daniels, owner of the Beneficial interest in certain Forest Lieu Selections of these same lands, that it was filed Feb. 8, 1904. However this may be, the Forest Lieu Selections in question were filed on said last named date Feb. 8, 1904, but were rejected by the local officers in a letter to one, L. T. Barin, March 4, 1904, for conflict with certain homestead and timber and stone applications for part of the same lands, These Forest Lieu Selections were filed by Barin in the name of Edward B. Perrin, and Aztec Land and Cattle Co. but the said A. D. Daniels was the beneficial owner of the scrip, which was filed in his interests to protect his purchase from the state under its aforesaid Invalid Indemnity Selections.

On appeal, your office affirmed the action of the

Register and Receiver, giving as further reason and justification thereof the fact, that the Lieu Selections were presented at the local land office prior to cancellation of said Indemnity School Selections, and even prior to the filing of the state's relinquishment. Upon appeal, however, from this action of your office, the Department, Oct. 25, 1905, reversed your office decision, stating while the appeal was pending an affidavit had been filed by A. D. Daniels in which he stated that he was the real party in interest and the equitable owner of the lands assigned as bases for the Lieu Selections; that after its selections of the lands as School Indemnity, the State of Oregon had sold them to sundry purchasers, who paid part of the purchase price and assigned the certificates of sale to him, and he was then the owner thereof; that he thereafter became doubtful as to the validity of the State selection, and in order to protect his interests obtained relinquishments from the State and caused them to be filed in the Local Land Office at Lakeview with Lieu Selections; that in so doing he relied upon your office report of Oct. 13, 1904, (1903) to the Secretary of the Interior; which report was transmitted by the Department to the Governor of Oregon Oct. 17, 1904 (1903).

Considering the appeal, the Department held that the case, was controlled by its decision in the California and Oregon Land Company, (33 L. D. 595), that this case was in all essential respects the same as that one, and remanded the case with directions to adjudicate it thereunder. The Lieu Selections having

been returned to the Register and Receiver for allowance in accordance with said decisions, they were again, on Dec. 6, 1905, rejected by the local officers, for the reason that the lands had been withdrawn by telegram of June 25, 1904, for the Klamath River project. This action of the Register and Receiver was reversed by your officer Jan. 23, 1906, and the selections were remanded to be entered of record as of date Feb. 8, 1904, the day on which they were originally presented, if no other objection appeared. Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office upon the said applications; and stated there were objections to the allowance of the same, in that there were various homesteads and timber and stone applications which had been allowed subsequently to the cancellation of the state's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

Separate appeals were taken by the Aztec Land and Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

Upon consideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels, was entitled to protection as a Bona Fide purchaser from the

state; that the State's selections were filed Jan. 28, 1902, while the lands were sold on Jan. 21st, preceding, at which they were public lands of the United States, and no one purchasing them could claim to be a Bona Fide purchaser from the State; that as late as Oct. 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a Bona Fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed: and if had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a Bona Fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the General land laws; that to conceed to him this privilege under letters Oct. 17 & 13, 1903, mentioned above, would in effect, be to make such persons as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's list invalid for want of sufficient base; the filing of the State's relinquishment, and the protection of the purchaser from the state by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

A motion for review of said decision of June 26th, 1906, having been filed by Daniels, Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels, was not, strictly speaking a Bona Fide purchaser from the State, because the Certificates of sale issued by the State antedated the filing of the School Indemnity Selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a Bona Fide Purchase.

The decision of June 26th, 1906, was therefore recalled, and it was ordered that the Lieu Selection should be reinstated.

In promulgating the decision last mentioned, your office returned the Lieu Selections to the Local Land Office for allowance, and instructed the Register and Receiver to notify all parties who had made entry of said lands subsequently to the cancellation of the State's list to show cause within sixty days why their entries should not be cancelled, because of conflict with said Lieu Selections as a result of which a petition termed, a motion for re-review of Departmental decisions of May 15, and 18, 1907, was filed on behalf of Archie. Johnson who claimed a part of the Lands under a sale made thereof under the Public Land Laws.

This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved: that the entire proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the public land laws.

Considering this petition, the Department stated in its decision of August 10th, 1907, that its previous decisions had been ex parte, and that the last decision favorable to Daniels did not prevent your office ordering a hearing, or taking other action with respect to the disposition of the claims of others which might be materially affected by the re-instatement of the claim of Daniels; and the case was accordingly remanded to your office for further consideration, to the end that a full and thorough investigation might be made into the matter, and your office was expressly advised that the previous decisions of the Land Department should in no wise embarass your action in the premises.

A hearing was accordingly ordered; and after due notice to all parties concerned, that the same was had before the local land office, May 25, 1908, Daniels appearing in person and by attorney, and the other parties claiming an interest either in person or by an attorney. The Local Land Office found that the case was not similar in all respects to that of the California and Oregon Land Company cited above; that in

that case there were no intervening rights or equities of other parties, while in the case under consideration the lands had been entered by bona fide settlers or purchasers, to many of whom final certificates had issued and in some instances even Patents had been issued.

The Register and Receiver accordingly recommended that the Homestead and Timber and Stone Entries of the various parties in the case should be allowed to remain in tact. Daniels appealed to your office, whereby your said decision of April 13, 1909, the action of the Local Office was reversed, and it was held that the Lieu Selections should remain in tact.

An appeal on behalf of the Homestead and Timber and Stone claimants brings the case before the Department. Most of the applicants to purchase the lands from the State upon whose supposed initiative these selections were made were not persons in being, but were fictitious persons, usually designated as "Dummies."

But while this is so, there is no evidence in this record showing or tending to show, that Daniels, or any person in privity with him, in fact, was a party to or had any knowledge of the intended fraud; and every material fact in this record supports the conclusion that Daniels bought in good faith, the Certificates of sale issued by the State. He had never heard of these State's Selections until one McHale, a timber land speculator of whom he had no personal acquaintance, but who was known to him by reputation, had reported to him that there was a large body of timber

land for sale, at Klamath, Oregon; and upon McHale's representations, he constituted McHale his agent under powers which amounted to, co-partnership, and McHale went to Klamath Falls to fully investigate these lands and the title thereto. McHale had instructions from Daniels, among other things, to secure the services of an attorney upon the question of title.

He did so. The attorney after an examination of the certificates of sale, reported that the title was good, and McHale's inquiries into the character of the land being satisfactory the results of his investigations was reported to Daniels and the deal was closed, upon the payment by Daniels of $23,901.10 for the certificates, of sale, and the further payment to the State of the unpaid ballance of the purchase price thereon, amounting to $3,033.74. Daniels had no personal acquaintance with any of the parties to the transactions; and so far as it appears from this record, he had no knowledge, information or belief which should have caused him to question the bona fides, of the people with whom he was dealing, or cause him to suspect that there was irregularity in the transaction. Nor was there anything in his connection with subsequent events, in his efforts to acquire title to these lands which may reasonably be said to go to the good faith of his purchase. It appears that rumors were soon thereafter rife with reference to land frauds in Oregon in connection with its school land grant.

The rumors reached Daniels and he promptly investigated them, finding for the first time that his title was questionable, upon the advice of his attorney, he initiated a contest against the State's selections upon which his title rested, hoping thereby to protect his purchase by acquiring an equitable preference right.

As a result of this contest, the state refunded the money which he had paid it and put in the hands of his attorney a relinquishment to the United States of all rights under its selections. Daniels then caused said relinquishments to be filed in the District Land Office, together with the Lieu Selections. There was certainly nothing reprehensible in this proceeding. Moreover, it was taken upon certain suggestions made in your said report of October 13, 1903. This report was responsive to a letter from the Governor of Oregon, September 28, 1903, wherein the inquiry was made of this department as to the means of protecting bona fide purchasers of the school indemnity lands from the State in instances where the State's selections had been cancelled for invalid base. Your offices reported among other things, and this is the same report transmitted to the Governor of Oregon, Oct. 13, 1903, that as to such selections—

while the selection is of record and uncancelled, the land is segregated thereby, and no right can be acquired by the presentation of an applicaiton therefor (29 L. D. 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure right of entry.

This is also the plain holding of this Department in the
in California and Oregon Land Company, supra, and is precisely the course pursued by Daniels in this case. His contest against the State's selection was to that end. He secured the State's relinquishments and presented them with the aforesaid applications to scrip the land.

It is true the record shows that the relinquishments were not marked, filed, in the local office until Feb. 10, 1904, which was two days after the presentation of the scrip applications.

It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been receved on February 8, instead of February 10, the filing would have been noted on the day they were received.

But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

The filing was by mail, and the letter of transmittal was written by Daniel's attorney, the said L. T. Barrin.

The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered

scrip applications, is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

It is worthy of too, that there has not been found any correspondence or record which would indicate that if the said Barin, had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

I conclude therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be, in your office report of September 28th, 1903, above quoted.

Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This however, it has been seen, was not done.

The scrip applications were rejected, and the history of the case, hereinbefore set out, shows that these applications were kept alive by successive appeals,

and that the case was twice remanded to the local officers, with directions to allow the applications, but various reasons were assigned for the neglect or failure of the local officers to obey these instructions.

It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries for most of these lands. It is thought however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See Hoyt vs. Weyerhauser et al). (161 F. E. D., Rep., 324).

It appears however, from your office reports of Dec. 16, 1909, that there are approximately 107 quarter Sections of land involved in this case. Of these, twenty-eight are involved in homestead entries, four

in cash entries and homestead entries, twenty-four in cash entries, twenty-five in Timber and Stone sworn statements, twelve are free and unappropriated, eight of them do not appear to be covered by the Lieu Selections in question, and seven of them have been patented.

In view of what has been said, the claim of Daniels must be denied as to all of them except those covered by Timber and Stone sworn statements only, and those that are unappropriated, amounting to what seems to be, from your office reports, approximately thirty-seven quarter sections in all.

As to these lands, the Timber and Stone applicants have not put themselves in privity with the United States, and the Land Department has not entered in to such Contract with them as to preclude other disposition of the lands.

See Campbell vs. Weyerhauser et al (161 Fed. Rep., 332).

This being true, and believing that the equities of Daniels should be protected to the fullest extent consistent with equitable administration, I have to direct that the Scrip applications be allowed as to all tracts which have not been otherwise disposed of, and rejected as to such as now appear to be covered by Homestead and cash entries.

The decision appeal from is modified. The papers are herewith returned.

Very respectfully,

FRANK PIERCE,

First Assistant Secretary.

Enclosures.

[Endorsed]: Amended Bill in Equity. Filed May 4, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 27 day of May, 1912, there was duly filed in said Court, a Demurrer, in words and figures as follows, to wit:

[Demurrer to Amended Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JOHN C. LEONARD,

Defendant.

The demurrer of the above named defendant to the amended bill of complaint of A. D. Daniels, complainant:

This defendant, John C. Leonard, by protestation, not confessing or acknowledging all or any of the matters or things in said amended bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, demurs to the said bill and for cause of demurrer says:

I.

That it appears from plaintiff's own showing, by his amended bill of complaint herein, that he is not entitled to the relief prayed by said bill against this defendant.

II.

That it appears from the amended bill of complaint herein that this Court has no jurisdiction to hear and determine this suit.

III.

That said amended bill of complaint does not show that the Homestead Entry made by defendant on January 9, 1905, for the lands mentioned in paragraph V of plaintiff's complaint was ever protested, or that any contest was ever levied or filed against said Entry by the plaintiff, in the United States Land office at Lakeview, Oregon, or that any protest was ever made to prevent the issuance of Final Receipt or United States patent upon said Entry.

IV.

That the plaintiff, in and by his said amended bill of Complaint, does not show that he ever initiated any right, or ever acquired a vested right in and to the land mentioned in paragraph V of said amended bill of complaint, or that he ever acquired any right thereto of which a court of equity would take cognizance or protect.

V.

That said amended bill of complaint does not show that plaintiff exhausted his remedy in the Interior Depatment of the United States, prior to the issuance of United States patent to defendant for said land, in that it is not shown that a moion for review or rereview of the decision of the First Assistant Secretary of the Interior, rendered Feburary 17, 1910 (a copy of which is attached to plaintiff's amended bill of com-

plaint, and by reference incorporated in and made a part thereof, and marked Exhibit "A",) which plaintiff was permitted, by the Rules of Practice in cases before the Interior Department to make, was ever made by him, nor does said bill show that the plaintiff ever applied to the Honorable Secretary of the Interior for a re-hearing of his said decision of February 17, 1910, or that he ever requested the Honorable Secretary of the Interior to exercise the supervisory power vested in him by the laws of the United States with reference to his, Plaintiff's said attempted lieu selection mentioned in paragraph VII of plaintiff's amended bill of complaint.

VI.

That the said amended bill of complaint is deficient in certainty, in this: That it does not state the date of the appeal mentioned in paragraph XIX thereof.

VII.

That said amended bill of complaint of plaintiff is wholly without equity.

VIII.

That said amended bill of complaint does not state facts sufficient to constitute a cause of action against this defendant.

WHEREFORE, This defendant demands the judgment of this honorable Court whether he shall be compelled to make any further answer to the said bill, or to any part thereof, or to any of the matters and things therein contained, and prays to be hence

dismissed with his reasonable costs in this behalf sustained.

J. H. CARNAHAN,
Solicitor for Defendant.

I hereby certifiy that the foregoing demurrer is, in my opinion, well founded in law.

J. H. CARNAHAN,
Solicitor for Defendant.

STATE OF OREGON,
County of Klamath—ss.
District of Oregon.

I, John C. Leonard, being first duly sworn, depose and say:

That I am the above named defendant and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

JOHN C. LEONARD,

Subscribed and sworn to before me this 23rd day of May, 1912.

[Seal.] J. H. CARNAHAN,
Notary Public for Oregon.

[Endorsed]: Demurrer to Amended Bill. Filed May 27, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Saturday, the 10 day of August, 1912, the same being the 23 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Decree.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JOHN C. LEONARD,

Defendant.

This cause coming on regularly to be heard by the Court upon the demurrer of the defendant to the amended bill of complaint of the above named plaintiff, and the defendant having appeared by his attorney, J. H. Carnahan, and the plaintiff having appeared by his attorneys, Messrs. Platt & Platt and Hugh Montgomery, and the Court having heard the arguments of counsel for the respective parties hereto, and having taken said cause under advisement, and fully considered the same, and being now fully advised in the premises, and it appearing to the Court that the said demurrer is well taken and should be in all respects sustained, and that said amended bill of complaint is without equity, and should be dismissed,

IT IS THEREFORE ORDERED, CONSIDERED, ADJUDGED AND DECREED by the Court that the said demurrer to said amended bill of complaint be, and the same is hereby, in all respects sustained, and that said amended bill of complaint be, and the same is hereby dismissed, and that said defendant have and recover of and from said plaintiff his costs and disbursements herein, taxed at $.....

Dated this 10th day of August, 1912.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,
Plaintiff,

vs.

JOHN C. LEONARD,
Defendant.

The above named plaintiff conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the 10th day of August, 1912, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon his filing a bond for the payment of all damages and costs if he fails to prosecute the said appeal to effect which bond shall act as a supersedeas bond.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, Solicitors for Plaintiff.

Hugh Montgomery,

of Counsel.

[Endorsed]: Petition for Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, Assignments of Error, in words and figures as follows to wit:

[Assignments of Error.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JOHN C. LEONARD,

Defendant.

Now on this 29th day of August, 1912, comes the above named plaintiff A. D. Daniels, appearing by Messrs. Platt & Platt, and Hugh Montgomery, his solicitors of record and says that in the record and proceedings of the above entitled Court in the above entitled cause and in the final order and decree entered therein on the 10th day of August, 1912, there is manifest error and that said order and decree is erroneous and against the just rights of said plaintiff and for error the said plaintiff assigns the following:

I.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff, on the 8th day of April, 1904, made a valid forest lieu selection of the lands described in paragraph V of plaintiff's amended bill filed in said cause under and in accordance with the provisions of the Act of Congress of June 4th, 1897, set forth in paragraph VI of plaintiff's amended bill of complaint.

II.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the forest lieu selection of the plaintiff made upon the lands described in paragraph V of his amended bill of complaint was prior in time to and initiated a right and interest superior to the claim of any person or persons whomsoever and particularly the defendant.

III.

Because the above entitled court erred in sustaining the demurrer to plaintiff..s amended bill of complaint in that it did not hold that by the admissions of the demurrer the attempted homestead entry of the defendant was subsequent in time and inferior in right to the forest lieu selection of the plaintiff.

IV.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint

in that it did not hold that by the admissions of the demurrer the forest lieu selections of the plaintiff had been approved by the proper officers of the United States government which approval gave the plaintiff a vested interest in the land so selected.

V.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the alleged homestead entry of the defendant was made in contravention of the vested rights of the plaintiff herein.

VI.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff was equitably entitled to be protected in the forest lieu selections which he had made on the lands described in paragraph V of his amended bill of complaint as against the claims of the defendant or any person or persons whomsoever.

VII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff was equitably entitled to have the defendant declared a trustee for the plaintiff of the lands described in paragraph V of his amended bill of complaint.

VIII.

Because the above entitled court erred in sustaining

the demurrer to plaintiff's amended bill of complaint in that it did not hold that the bill of complaint stated a good cause of action to which the defendant should be required to file his answer or plea.

IX.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendant.

WHEREFORE, the plaintiff and appellant prays that the decree of said court be reversed and such directions be given that full force and efficacy may enure to the plaintiff by reason of the cause of suit set up in his amended bill of complaint filed in said cause and that a decree be entered in accordance with the prayer of plaintiff's amended Bill of Complaint.

PLATT & PLATT and HUGH MONTGOMERY,
Solicitors for Plaintiff.

Hugh Montgomery,
of Counsel.

[Endorsed]: Assignment of Errors. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, an Order Allowing Appeal, in words and figures as follows, to wit:

[Order Allowing Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JOHN C. LEONARD,

Defendant.

This day came A. D. Daniels, plaintiff, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record and presented his petition for an appeal and an assignment of errors accompanying the same which petition, upon consideration of the court, is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the filing of a bond in the sum of $500 with good and sufficient surety to be approved by the court; and

It is further ordered that said bond shall act as a supersedeas bond, and

It is further ordered that a certified transcript of the record, and all proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

R. S. BEAN,

Judge.

Dated this 29th day of August, 1912.

[Endorsed]: Order Allowing Appeal. Filed Aug. 29, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JOHN C. LEONARD,

Defendant.

KNOW ALL MEN BY THESE PRESENTS:

That we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surey, are held and firmly bound unto John C. Leonard, in the full and just sum of five hundred ($500) dollars to be paid to the said John C. Leonard, his executors, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents;

Sealed with our seals this 29th day of August, A. D., 1912.

WHEREAS, lately at the District Court of the United States for the District of Oregon, in a suit pending in said court between A. D. Daniels, plaintiff, and John C. Leonard, defendant, a decree was rendered against said plaintiff, A. D. Daniels, and said A. D. Daniels having petitioned an appeal and filed a copy thereof in the clerk's office in said court to re-

verse the same in the aforesaid suit, and a citation directed to the said John C. Leonard, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the City of San Francisco in said Circuit, on the 28th day of September, A. D., 1912, having been served on said defendant;

NOW, the condition of this obligation is such, that if the said A. D. Daniels shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

A. D. DANIELS,

By Platt & Platt His Solicitors of Record.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

[Seal.] By HARRISON G. PLATT,

Attorney in Fact.

By W. J. CLEMENS,

Agent.

Examined and approved this 29th day of August, 1912.

R. S. BEAN,

District Judge.

[Endorsed]: Bond on Appeal. Filed Aug. 29, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of August, 1912, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

A. D. DANIELS,

Appellant.

vs.

JOHN C. LEONARD,

Appellee.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit—ss.

TO JOHN C. LEONARD, GREETING:

WHEREAS, A. D. Daniels, appellant in the above entitled suit has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the District of Oregon, made in favor of you, the said John C. Leonard, and has filed the security required by law; you are therefore hereby cited to appear before the said United States Circuit Court of Appeals at the City of San Francisco, state of California, on the 28th day of September, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the City of Portland in the Ninth Judicial Circuit this 29th day of August, in the year of our Lord, one thousand nine hundred twelve.

R. S. BEAN,

Judge of the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
District of Oregon—ss.

Due service of the within Citation to Appeal by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 5th day of September, 1912.

J. H. CARNAHAN,
of Attorneys for Appellee.

[Endorsed]: Citation to Appellee. Filed Sept. 10, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Saturday, the 28 day of September, 1912, the same being the 77 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to wit:

[Order Enlarging Time to File Record.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,
Plaintiff,
vs.
JOHN C. LEONARD,

No. 5463.

September 28, 1912.

Now, at this day, for good cause shown, it is ORDERED that the plaintiff's time for filing and docket-

ing the record on appeal in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby enlarged and extended ninety (90) days from this date.

R. S. BEAN,
Judge.

No. 2222

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

JOHN C. LEONARD,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Oregon

STATEMENT OF THE CASE.

On and prior to the 12th day of April, 1902, one Edward B. Perrin and the Aztec Land and Cattle Company, Ltd., a corporation, were each the owners in fee simple, free of any liens or incumbrances, of certain real property located in the Territory of Arizona, and continued to be such owners up until the 2d day of February, 1904. On the 12th

day of April, 1902, these lands were included within the limits of the San Francisco Mountains Forest Reserves, pursuant to a proclamation issued by the President of the United States. Subsequently and on the 2d day of February, 1904, these parties, acting under and in accordance with the provisions of the Act of Congress passed the 4th day of June, 1897, which Act provided amongst other things that the owners of lands embraced within the limits of a forest reservation might deed back their interests to the United States and select in lieu thereof any unoccupied public land, relinquished and conveyed to the United States their interest in the Arizona land referred to, recorded said deed at the proper office in the county where the land was situated, and on the 8th day of February, 1904, made lieu selections of certain lands situated in the County of Klamath, State of Oregon, which lieu selections were made for the benefit of the appellant in this case. The selections were perfected by presenting the recorded deed, together with a full, true and correct abstract of title showing that the selectors were the owners in fee simple of the lands relinquished, immediately prior to the time the deed to the United States was recorded, as required under the rules issued by the Secretary of the Interior of the United States.

Prior to the time that these selections were made and on or about the 28th day of June, 1902, the State of Oregon had filed upon the property

so selected certain instruments purporting to be school indemnity lists, and before the approval of these lists, had sold the land to the appellant in this case. It afterwards developed that the selections so made by the State of Oregon were rejected upon the ground that the base land which the State had tendered in exchange for the land embraced in its school indemnity lists was not proper base land. The appellant in this case had purchased these lands from the State of Oregon in good faith, but found that the State had given him nothing in exchange for the consideration which he paid. For the purpose of protecting his interests thus acquired, the forest lieu selections already referred to, were made.

At the time of making these selections the lieu selectors presented and filed together with their lieu selections, relinquishments from the State of Oregon of any rights which it might have acquired by virtue of the school indemnity lists filed as above stated. The Secretary of the Interior had held that the filing of school indemnity lists, regardless of their validity, segregated the lands filed upon from the public domain, and therefore these relinquishments were presented in order to relieve the lands in question from the effect of such segregation.

After the making of these lieu selections and the filing of these relinquishments, the officers of the United States Land Office, located at Lake-

view, Oregon, allowed other entries to be made upon the lands so selected, which entries were in direct conflict with the forest lieu selections so made as above stated. This conflict resulted in several successive appeals to the Interior Department of the United States, which appeals extended over a period of about six years. During the continuance of these appeals and on the 25th day of October, 1905, the Secretary of the Interior directed that the forest lieu selections so made as above stated be allowed as of the date on which they were filed, to-wit: February 8, 1904. This the local officers at Lakeview, Oregon, refused to do on the ground that the lands had been withdrawn for what was known as the Klamath River Project. As a result of this refusal the matter again came before the Secretary of the Interior and on June 26, 1906, he again ordered and directed that the said lieu selections be reinstated. After the making of the order last referred to a petition for a review of the entire proceedings was filed on behalf of an individual by the name of Archie Johnson, a speculator who was trying to procure these lands, which petition was allowed. A rehearing of all the facts took place before the Register and Receiver of the local land office at Lakeview, Oregon, which officers recommended that the forest lieu selections be disallowed and the other entries reinstated. This recommendation of the local officers was refused by the General Land Office on the 13th day of April,

1909, at which time the Commissioner of the General Land Office directed that the forest lieu selections referred to be allowed to remain intact. This last named ruling was taken before the Secretary of the Interior, and on the 17th day of February, 1910, the Secretary of the Interior held that although the forest lieu selections referred to were in all respects regular and should have been allowed when presented, still it was within the competency of the officers of the United States Land Department to dispose of the lands to whomsoever they might choose and that having done so the entries which were in conflict with these forest lieu selections would be allowed and the rights of the lieu selectors, and the appellant in this case, would be denied in all instances where such conflict had occurred.

The appellant having exhausted all the remedies which were available to him in the proceedings before the Land Department waited until a patent to the lands involved was issued to the appellee in this case, and then instituted the present suit to have the appellee declared a Trustee of said lands for the appellant, invoking the well-known and well established principle that where the officers of the general government through the application of an erroneous principle of law or a wrong interpretation of a statute, confirm title to public lands to one entryman in an instance where another entryman is lawfully entitled thereto, courts of equity will

intervene and declare the party to whom title has been wrongfully confirmed a Trustee of the party to whom the land rightfully belongs.

On the 13th day of January, 1912, the appellant filed in the District Court of the United States for the District of Oregon, a bill of complaint setting forth the facts substantially as above stated, to which bill of complaint the court sustained a demurrer interposed by the appellee.

Subsequently, and on or about the 4th day of May, 1912, the appellant filed an amended bill of complaint, to which amended bill of complaint the court again sustained a demurrer interposed by the appellee upon the ground that the amended bill of complaint failed to state facts sufficient to constitute a cause of suit. A decree was entered dismissing the case and from this decree an appeal has been perfected.

SPECIFICATION OF ERRORS.

The errors relied upon by the appellant are as follows:

First. The trial court erred in not holding that by the admissions of the demurrer filed by the appellee to the appellant's amended bill of complaint the appellant did on the 8th day of February, 1904, make a valid forest lieu selection of the lands embraced in Paragraph 5 of his amended bill of complaint, and that said forest lieu selection so

made was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever and particularly the appellee, and in not holding that by the admissions of the demurrer the attempted homestead entry of the appellee was subsequent in time and inferior in right to the forest lieu selection of the appellant.

Second. The trial court erred in sustaining the demurrer to appellant's amended bill of complaint, in that it did not hold that by the admissions of the demurrer the forest lieu selection of the appellant had been approved by the proper officers of the United States Governemnt, which approval gave the appellant a vested interest in the land so selected against the claim or claims of all persons whomsoever and particularly the appellee.

Third. The trial court erred in not holding that by the admissions of the appellee's demurrer the alleged homestead entry of the appellee was made in contravention of the vested rights of the appellant, and because the trial court erred in sustaining the demurrer to the appellant's amended bill of complaint in that it did not hold that by the admissions of the demurrer the appellant was equitably entitled to be protected in the forest lieu selection, which he had made upon the lands described in Paragraph 5 of his amended bill of complaint as against the claims of the appellee or any persons whomsoever.

Fourth. The trial court erred in sustaining the demurrer to appellant's amended bill of complaint in that it did not hold that by the admissions of the demurrer the appellant was equitably entitled to have the appellee declared a Trustee for the appellant of the lands described in Paragraph 6 of his amended bill of complaint.

Fifth. The trial court erred in sustaining the demurrer to the appellant's amended bill of complaint in that it did not hold that said amended bill of complaint stated a good cause of suit to which the appellee should be required to file her answer or plea, and in decreeing that appellant's amended bill of complaint be dismissed and in allowing costs to the appellee.

Sixth. The trial court erred in not holding that by a proper construction of the Act of Congress of June 4, 1897, the appellant was entitled to have his forest lieu selection of the lands embraced in Paragraph 5 of his amended bill of complaint sustained as against the entry of the appellee and that by a proper construction of said Act the appellee should be declared a Trustee for the appellant of the lands described in Paragraph 5 of appellant's amended bill of complaint, which lands were patented to the appellee, all of which matters and things constitute and present a Federal question.

POINTS AND AUTHORITIES.

I.

Whenever lands are embraced within a forest reservation pursuant to a proclamation of the President of the United States, the owners of such land might prior to March 3, 1905, select in lieu thereof any vacant unoccupied public land of the United States.

Act of June 4, 1897, 30 Stat. at L. 36; U. S. Comp. Stat. 1901, p. 1541.

II.

Courts of equity have power to grant relief to an individual aggrieved by the erroneous decision of a legal question by the department officers.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 109; 47 Law. Ed. 91, 96.

III.

If a patent to land to which one is entitled has been improperly issued by the United States to another, the courts will quiet the title of the former or adjuge the other a Trustee of the title for him.

Loney v. Scott, 112 Pac. 172, 175 (Ore. 1910).

Morrow v. Warner Valley Stock Co., 101 Pac. 171, 185 (Ore. 1909).

Lee v. Johnson, 116 U. S. 48, 49; 29 Law. Ed. 570.

Kerns v. Lee, 142 Fed. 985, 988 (C. C. D. Ore. 1906).

Stark v. Starrs, 6 Wall. 402, 419; 18 L. Ed. 925, 930.

Silver v. Ladd, 7 Wall. 219, 228; 19 L. Ed. 139, 141.

Shepley v. Cowan, 91 U. S. 330, 340; 23 L. Ed. 424, 428.

IV.

The filing of a lieu selection segregates the land upon which the filing is made from the public domain and cuts off all intervening and subsequent rights as against the lieu selector.

Weyerhauser v. Hoyt, 219 U. S. 380, 388; 55 L. Ed. 258, 261.

Santa Fe Pacific R. R. Co., 41 L. D. 96, 98 (June, 1912).

V.

The Act of June 4, 1897, created a standing offer upon the part of the Government to exchange the land within a forest reservation for any unoccupied public land, and this offer once accepted be-

comes a contract between the Secretary of the Interior and the lieu selector.

Roughton v. Knight, 219 U. S. 544; 55 L. Ed. 326, 327.

VI.

The power of supervision possessed by the officers of the Land Department, to correct or annul entries of land or change their prior rulings or set aside the action of the local land officers is not an unlimited or arbitrary power.

Cornelius v. Kessel, 128 U. S. 456, 461.

Ballinger v. United States ex rel. Frost, 216 U. S. 240, 248; 54 L. Ed. 465, 468.

Peyton v. Desmond, 129 Fed. 1, 9 (C. C. A. Eighth Circuit, 1904).

Howe v. Parker, 190 Fed. 738, 757 (C. C. A. Eighth Circuit, 1911).

VII.

Under the Act of June 4, 1897, a vested interest is created by the filing of a forest lieu selection.

Olive Land and Development Co. v. Olmstead, 103 Fed. 568, 574 (C. C. Cal., 1900).

VIII.

The power of approval being a judicial power, imposes upon the Secretary of the Interior the duty

to determine the lawfulness of selections as of the time when the exertion of the authority is invoked by the lawful filing of a selection list.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 387; 55 L. Ed. 258, 261.

IX.

If the case made by the plaintiff is one which depends upon the proper construction of an Act of Congress, with a contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States.

Northern Pacific Railroad Company v. Soderberg, 188 U. S. 526, 528; 47 L. Ed. 575, 581.

X.

It is a well established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him.

Lytle v. The State of Arkansas, 9 How. 314, 332.

ARGUMENT.

The amended bill of complaint filed by the appellant in the case at bar proceeded upon the theory that where the public land officers of the United States Government make an application of an erroneous principle of law or adopt an erroneous construction of a statute in determining the rights of claimants to public land, a court of equity will intervene after the issuance of patent and declare the patentee to be the holder of the land in trust for the party to whom the land should be awarded. This principle has been announced by an almost unbroken line of decisions, and was very concisely and accurately stated by the Supreme Court of the United States in the case of Lee v. Johnson, 116 U. S. 48, 49; 29 L. Ed. 570, in which case the following language was employed:

> "If, however, those officers mistake the law applicable to the facts, or misconstrue the statutes, and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such a case merely directs that to be done which those officers would have done if no error of law had been committed."
>
> Lee v. Johnson, 116 U. S. 48, 49; 29 L. Ed. 570.

The decison of the Secretary of the Interior Department determining the rights of the respective

claimants to the land involved in the case at bar, is attached to and made a part of the appellant's amended bill of complaint and appears on pages 20 to 33 inclusive of Appellant's Transcript of Record. This decision after setting forth the facts hereinbefore presented in our statement of this case, proceeded to hold that the forest lieu selections of the appellant were in all respects regular and in accordance with the requirements of the rules governing forest lieu selections, and continued as follows:

"It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the secretary had been carried out it would have been done before the case became complicated by the counter equitable considerations arising upon the unfortunate allowance of the homestead and timber and stone entries for most of these lands. It is thought, however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the department would not be justified in cancelling such entries and filings for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the land department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition."

See Hoyt v. Weyerhaesuer et al. (161 Fed. Rep. 324).

Appellant's Transcript of Record, page 32.

The language thus quoted presents in its own words the error which has deprived appellant of his rightful interests. The very case cited in support of this error was afterwards reversed by the Supreme Court of the United States and its decision in this particular will be referred to later. When the Secretary said "That Daniel's application was in all respects regular and might have been allowed when presented," he directly contradicted the previous findings of the very decision in which this language was used. It appears from this decision that the department directed the allowance of these selections on October 25, 1905. (Appellant's Transcript of Record, pages 22, 23.) The same decision also shows that on June 26, 1906, the department again ordered that the lieu selections be reinstated. (Appellant's Transcript of Record, page 25.) Again it appears from the face of the same decision that the General Land Office directed on April 13, 1907, that said lieu selections remain intact. (Appellant's Transcript of Record, page 27.)

The appellant contends that the power of the Land Department to determine the validity of entries or selections is not an arbitrary or unlimited power, and that in the exercise of such power the department is not permitted to dispose of public lands to whomsoever it wishes, but must follow the directions of the law governing the acquisition of such lands and determine whether or not all required acts in connection with the acquisition there-

of have been performed. The appellant further contends that where the Land Department finds all such necessary acts to have been performed in connection with a selection of public land in lieu of land included within the limits of a forest reservation, as provided by the Act of June 4, 1897, and has once approved such a selection, that the said department can not thereafter disallow such selection in favor of a right which was subsequent in time to the right first initiated.

The Act referred to provides among other things as follows:

"That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: Provided further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

Act of June 4, 1897, 30 Stat. at L. 36; Vol. 2, U. S. Comp. Stat. 1901, p. 1541.

Appellant's Transcript of Record, page 4.

The above Act was construed by the Circuit Court of the United States for the Southern District

of California in the case of Olive Land and Development Co. v. Olmstead, 103 Fed. 568, in which case his honor, Judge Ross, held that a mere filing of a forest lieu selection created a vested interest in the lands selected without reference to the approval of any Land Department officer. The language used in this particular was as follows:

"And, turning to the act under consideration, it is seen, and as has already been observed, that the power to 'select' is by the statute given to the party who is invited to make the exchange, provided always that he confines his selection to the class of lands described in the statute, to-wit: Those vacant and open to settlement. No other condition is imposed by the statute. The act in question differs very materially in this respect from the indemnity clauses of many of the railroad and other grants, requiring the selections to be made by and with the advice, consent, direction or approval of some officer of the land department, in which case such consent or approval is deemed a condition precedent to the vesting of any interest in the selected land."

Olive Land and Development Co. v. Olmstead, 103 Fed. 568, 574 (C. C. Cal., 1900).

The appellant, relying upon the language of this case, argued in the court below that the mere filing of his forest lieu selection created in him a vested interest in the land selected as against all others, without reference to the approval of the Interior Department, and that said department could only disapprove his selection for failure to comply with the requirements of the statute, such as his inability

to show good title to the land relinquished, or to establish that the land selected was public, unoccupied, non-mineral land, free and open to entry. The trial court, however, held that the case of Olive Land and Development Co. v. Olmstead was now of no force and effect for the reason that Judge Ross in the case of Cosmos Exploration Company v. Gray Eagle Oil Company, 104 Fed. 20, 34, had explained that the case of Olive Land and Development Co. v. Olmstead, 103 Fed. 568, had been decided without reference to the rules of the Land Department regulating the procedure of applicants for exchange of lands under the Act of June 4, 1897, and for the further reason that the Supreme Court of the United States in the same case of Cosmos Exploration Company v. Gray Eagle Oil Company, 190 U. S. 301, 312; 47 L. Ed. 1064, 1072, had held that the mere filing of papers was not sufficient to create an equitable title and that a decision as to the validity of the filing was necessary.

(See opinion of trial court, pages 23, 24, Appellant's Transcript of Record, in Case of Daniels v. Wagner, No. 2217.)

The Supreme Court of the United States, in the case last referred to, used the following language:

"There must be a decision made somewhere regarding the rights asserted by the selector of land under the act before complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the

statute, and the selector cannot decide the question for himself."

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 312; 47 L. Ed. 1064, 1072.

The language last quoted presents nothing which is in conflict with the holding of Judge Ross in the case of Olive Land and Development Co. v. Olmsted, 103 Fed. 568, 574. The holding of Judge Ross was merely to the effect that the filing of a forest lieu selection initiated a vested right and created a vested interest. He did not hold, however, that such a right could be initiated and such an interest created by the mere filing of papers. The case contemplated that the selector must file the proper kind of papers and select the proper kind of land. These questions must, of course, be determined by the officers of the Land Department, and these very questions were determined in favor of the appellant in the case at bar, as shown by the allegations of his amended bill of complaint, which allegations are admitted by the appellee's demurrer. It is not claimed that the mere making of a lieu selection creates a complete equitable title, but it is claimed that the filing of such a selection segregates the land selected from the public domain and initiates a vested right and creates a vested interest which may ripen into a complete equitable title, when it is finally determined that the selection is in all respects regular.

Furthermore, the language quoted from the case of Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301; 47 L. Ed. 1064, 1072, was mere dicta in the case then before the court, and the real question decided was that in the case then under consideration, no decision whatsoever had been made by the Land Department with reference to the validity of the selection there made. The following language establishes this conclusion:

"Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished has never been decided by the land department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such questions themselves."

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 315; 47 L. Ed. 1064, 1073.

What application can the principles of law as applied to the facts before the court in the case last cited have with reference to the facts of the case at bar, wherein it is admitted that the selections of the appellant were in all respects regular, and such facts had been so determined by the Secretary of the Interior? We venture also to assert that no language can be found in the case of Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301; 47 L. Ed. 1064, which in any manner contravenes or contradicts the doctrine announced by Judge Ross in the case of Olive Land and De-

velopment Co. v. Olmstead, 103 Fed. 568, 574, holding that the filing of a forest lieu selection initiates a vested right and creates a vested interest, as against all subsequent entries without regard to the approval of the Land Department.

It has also been many times held that even in instances where the approval is necessary, such power of approval is neither arbitrary nor unlimited and can not be exercised without regard to established principles of law. This very rule was announced by the Circuit Court of Appeals for the Sixth Circuit, speaking through Mr. Justice Van Devanter. The case referred to holds as follows:

"But the power of the land department to review its prior holdings and to cancel existing entries is not unlimited or arbitrary."

(Citing Cornelius v. Kessel, 128 U. S. 456; 32 L. Ed. 482.)

Peyton v. Desmond, 129 Fed. 1, 9 (C. C. A., Eighth Circuit, 1904).

Again:

"Neither the general jurisdiction nor the supervisory power of the commissioner or of the secretary is arbitrary or unlimited. The effective exercise of each is conditioned by established rules of law. The settled rules and practice and the uniform decisions of the department constitute both rules of law and of property, and equitable titles in entrymen cannot be destroyed by the Land Department in violation of them. System, order and the uniform application of the established

rules and practice of the department to all litigants alike are as essential to the administration of justice in the land department as in the courts. What a farce the attempt to secure or protect rights in any judicial or quasi-judicial tribunal must become if its rules and decisions are ignored or applied to each case as it arises at the arbitrary will of the officer who presides. Equitable titles of claimants to lands under the acts of Congress may not be annulled by the land department in violation of its settled practice or of a rule of law and of property established by a long line of decisions of its officers, nor without legal notice to the parties in interest and an opportunity to be heard."

Howe v. Parker, 190 Fed. 738, 757 (C. C. A., Eighth Circuit, 1911).

As already shown by a reference to the decision of the Secretary of the Interior attached to the appellant's amended bill of complaint, he arbitrarily held that regardless of the regularity of the appellant's application and regardless of the unfortunate action of the local land office in allowing subsequent entries to be made, the Land Department would not cancel those entries for the mere purpose of protecting the equities of Daniels. This was one of those special cases referred to in the decision last cited where established rules and decisions were ignored at the arbitrary will of the presiding officer and the admitted equities of the appellant brushed aside by a mere stroke of the pen, and this appellant is here now asking this court whether or not such equitable titles as his can be thus an-

nulled in direct violation of even that most elementary principle that "first in time is first in right," assuming other equities to be equal. Not only was the appellant first in time, but he was likewise first in all other things save in receiving the proper protection of his vested interests.

Regardless, however, of the question whether or not under the provisions of the forest lieu selection act above cited the approval of the Land Department is necessary in order to create a vested interest, and regardless of whether or not that very department can exercise its own wayward will in determining the matters before it, and regardless of whether it can three times approve a selection and then arbitrarily review its prior rulings and cancel entries confirmed thereunder, nevertheless, it has been held that even in those instances where the requisite of approval has been made a condition precedent to the vesting of any interest by the very statute giving the right, the initiation of that right is sufficient to give it validity as against all others by virtue of its being first in time. This principle was announced by the Supreme Court of the United States in the very recent case of Weyerhaeuser v. Hoyt, 219 U. S. 380; 55 L. Ed. 258. In this case a lieu selection had been made by the Northern Pacific Railway under and in accordance with the provisions of the Act of July 2, 1864 (13 Stat. at L. 365, 367, Chap. 217), and the joint resolution of May 31, 1870, 16 St. at L. 378, and before

the approval of this selection, but subsequent to its filing, an application was made to purchase the land under the Timber and Stone Act. The selection of the Railroad Company was afterwards approved and patent issued thereon. A suit was instituted for the purpose of having the Railroad Company declared a Trustee of the legal title for the timber and stone entryman upon the theory that prior to the time when the Interior Department approved the selection of the railroad, the land was open and subject to entry by any qualified entryman. This view of the law was adopted by the Circuit Court of Appeals for the Eighth Circuit wherein it held that no equitable right was acquired under and by virtue of an indemnity selection until its approval by the Secretary of the Interior. The decision of the Circuit Court of Appeals is reported in 161 Fed. 324, and is the same decision referred to in the final adjudication of the Secretary of the Interior in the case at bar set forth on pages 20 to 33 inclusive of appellant's Transcript of Record, and is found in the same portion of the Secretary's opinion cited above, wherein he held that it was within the competency of the officers of the Land Department to allow other entries, regardless of the rights or equities of Daniels acquired under and by virtue of his lieu selection.

The Supreme Court of the United States in reversing the Circuit Court of Appeals, determined as follows:

"It is beyond dispute on the face of the granting act of July 2, 1864, C. 217, 13 Stat. at L. 365, 367, and of the joint resolution of May 31, 1870, C. 67, 16 Stat. at L. 578, extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. It is also beyond dispute that, as the only method provided by the granting act for executing the grant in this respect was a selection of the lieu lands by the railroad company, subject to the approval of the Secretary of the Interior, that a construction which would deprive the railroad company of its substantial right to select and would render nugatory the exertion of the power of the Secretary of the Interior to approve lawful selections when made, would destroy the right which it was the purpose of Congress to confer. That the effect of holding that lands lawfully embraced in a list of selections duly filed and awaiting the approval of the Secretary of the Interior could, in the interim, be appropriated at will by others would be destructive of the right of selection is not only theoretically apparent from the mere statement of the proposition, but has, moreover, in actual experience been found to be the practical result of carrying that doctrine into effect. See 25 Opin. Atty. Gen. 632. Considering the language of the granting act from a narrower point of view, a like conclusion is in reason rendered necessary. The right to select within indemnity limits was conferred to replace lands granted in place which were lost to the railroad company because removed from the operation of the grant of lands in place by reason of the existence of the rights of others originating before the definite location of the road. The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection, when made, should not include lands which at that time were

subject to the rights of others. The requirement of approval by the secretary consequently imposed on that official the duty of determining whether selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action of the secretary. The scope of the power to approve lists of selections, conferred on the secretary, was clearly pointed out in Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 511, 33 L. Ed. 687, 694, 10 Sup. Ct. Rep. 341, where it was said that the power to approve was judicial in its nature. Possessing that attribute, the authority therefore involved not only the power, but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections. This view, while it demonstrates the unsoundness of the interpretation of the granting act which the contrary proposition involves, serves also at once to establish that the obvious purpose of Congress in imposing the duty of selecting and submitting the selections when made to the final action of the Secretary of the Interior was to bring into play the elementary principle of relation, repeatedly sanctioned by this court and uniformly applied by the land department from the beginning up to this time, under similar circumstances, in the practical execution of the land laws of the United States. Without attempting to cite the many cases in this court illustrating and applying the doctrine, a few only which are aptly pertinent and here decisive are referred to. Gibson v. Chouteau, 13 Wall. 92, 100, 20 L. Ed. 534, 536; Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 720, 733, 28 L. Ed. 872, 877, 5 Sup. Ct. Rep. 334; Oregon & C. R. Co. v. United States, 189 U. S. 103, 112, 47 L. Ed. 726, 730, 23 Sup. Ct. Rep. 615; United States v. Detroit Lumber Co., 200 U.

S. 321, 334, 50 L. Ed. 499, 504, 26 Sup. Ct. Rep. 282, and cases cited.

"In Shepley v. Cowan there was conflict between a pre-emption claim and a selection on behalf of the State of Missouri under an act of Congress conveying to the state a large quantity of land to be selected by the governor, the act providing that if the selection should be approved by the Secretary of the Interior, patents were to issue. The court said (p. 337):

" 'The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office.'

"On page 338, after distinguishing Frisbie v. Whitney, 9 Wall. 187, 19 L. Ed. 668, and Yosemite Valley Case (Hutchings v. Low), 15 Wall. 77, 21 L. Ed. 82, the court said:

" 'But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.'

In St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 720, 28 L. Ed. 872, 5 Sup. Ct. Rep. 334, one of

the questions arising for decision was which of two railroad companies was entitled to certain tracts of lieu lands situated within overlapping indemnity limits of certain grants made by an act of Congress to the territory of Minnesota to aid in the construction of the roads of the contesting companies. The selections were to be made by the governor, and required the approval of the Secretary of the Interior. The Winona Company filed a list of selections. The St. Paul Company made no selections, but nevertheless, on grounds which need not be stated, the Secretary of the Interior certified the lands to the state for the use of that company. The Winona Company brought suit in the state court to have a declaration of its rights in the land and to restrain the St. Paul Company and others from receiving a patent or other evidence of title to the lands from the governor of the state. The state court decreed in favor of the Winona Company, and this court affirmed its action. In the course of the opinion it was said (page 731):

"'The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant or of lands which, for other reasons, are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road.'

"After referring to prior decisions the conclusion was reached that, as to the lands to be selected, 'priority of selection secures priority of right;' and that as the Winona Company alone had made selection of the lands, and that selection was lawful, the right to the land as against third parties vested in the Winona Company as of the date of the filing of its lists of selections. In concluding the opinion it was said (page 733):

"'It is no answer to this to say that the Secretary of the Interior certified these lands to the state for the use

of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for lieu lands or for the extended grant of 1864, out of any odd sections within 20 miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous decision of his cannot deprive the Winona Company of rights which became vested by its selection of those lands. Johnson v. Towsley, 13 Wall. 72, 80, 20 L. Ed. 485, 486; Gilson v. Chouteau, 13 Wall. 92, 102, 20 L. Ed. 534, 537; Shepley v. Cowan, 91 U. S. 330, 340, 23 L. Ed. 424, 427; Moore v. Robbins, 96 U. S. 530, 536, 24 L. Ed. 848, 851.' So, also, in Oregon & C. R. Co. v. United States, 189 U. S. 103, 47 L. Ed. 726, 23 Sup. Ct. Rep. 615, the court said (page 112):

" 'Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd numbered sections within its place or granted limit—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class the company acquires no interest in any specific sections until a selection is made with the approval of the land department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make.'

"The doctrine thus affirmatively established by this court, as we have said, has been the rule applied by the land department in the practical execution of land grants from the beginning. Porter v. Landrum, 31 Land Dec. 352; Re Southern P. R. Co., 32 Land Dec. 51; Re Santa Fe P. R. Co., 33 Land Dec. 161; Eaton v. Northern P. R. Co., 33 Land Dec. 426; Santa Fe P. R. Co. v. Northern P. R. Co., 37 Land Dec. 669. The well settled rule

of the land department on the subject was thus stated by the then assistant attorney general in the department, now Mr. Justice Van Devanter, as follows:

" 'Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

" 'There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

" 'What effect has been given to a pending railroad indemnity selection?

" 'Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal; but on August 15, that year, these withdrawals were revoked and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. Dinwiddie v. Florida R. & Nav. Co., 9 Land Dec. 74. In the circular of September 6, 1887 (6 Land Dec. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact a railroad

indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws.' (32 Land Dec. 53.)

"Despite the doctrine of this court, as expounded in the cases previously referred to, the unbroken practice of the land department from the beginning in the execution of land grants, impliedly sanctioned by Congress during the many years that administrative construction has prevailed, and the destructive effect upon rights conferred by land grant acts which would result from applying the contrary view, it is yet urged that this must be done because of decisions of this court which it is insisted constrain to that conclusion. One of the decisions thus referred to is Sjoli v. Dreschel, 199 U. S. 564, to which we have previously referred, and others are cited in the margin.

"What we have already said as to the Sjoli case would suffice to dispose of the suggestion concerning that case, but we shall recur to it. As to the other cases, it would be adequate to say that not one of them involved the question here under consideration, nor even by way of obiter was an opinion expressed on such question. Indeed, all the cases relied upon may be placed in one of three classes: (a) those involving the nature and character of the right, if any, to indemnity lands prior to selection; (b) whether such lands, after the filing of a list of selections and before action by the Secretary of the Interior thereon, could be taxed by a state to the railroad company as the owner thereof; and (c) those which were concerned with the nature and character of acts which were adequate to initiate a right to public land which would be paramount to a list of selections when the acts were done before the filing of the list of selections. In none of the cases, moreover, was

the well settled doctrine of this court as to relation, even by remote implication, questioned. Indeed, in most of the cases relied upon the previous decisions to which we have referred, expounding the doctrine of relation, were approvingly cited or expressly reaffirmed.

"The Sjoli case, from the facts we have already stated, is clearly here inapplicable, because it falls in the third of the above classes. If it be conceded that general language was used in the opinion in that case which, when separated from its context and disassociated from the issues which the case involves, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in Cohen v. Virginia, 6 Wheat. 399, 5 L. Ed. 290, so often since reiterated and expounded by this court, to the effect that 'general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.' The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the Sjoli case of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval by the Secretary of the Interior of a lawful list of selections. That the general expressions in the Sjoli case are not persuasive here clearly results from the demonstration which we have previously made, that to apply them would be in effect to destroy the indemnity provisions of the granting act. Moreover, that serious general injurious consequences would arise from treating the expressions relied upon in the Sjoli case as persuasive is clear (a) because to do so would result in the overthrow of the uniform rule by which the land department has administered land grants from the beginning—a rule continued in force

after the decision in the Sjoli case because of the administrative conclusion that that case should be confined to a like state of facts and not be extended to other and different conditions (25 Ops. Atty. Gen. 632); (b) because of the destructive effect upon rights of property and the infinite confusion which would now arise from extending, under the circumstances stated, the observations in the Sjoli case to the wholly different state of facts presented upon this record."

Weyerhaeuser v. Hoyt, 219 U. S. 380, 387; 55 L. Ed. 258, 261-264.

The opinion just quoted proceeds upon the theory that it appears from the face of the granting act and joint resolution therein referred to, that Congress intended to confer upon the lieu selector a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. That portion of said Act which relates to the right of selection provides as follows:

"And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior."

13 Stat. at L. 365, 367, 368.

The language of the Act which is now before this court for construction in the present case provides in part as follows:

"That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within

the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government and may select in lieu thereof a tract of vacant land open to settlement."

30 Stat. at L., 36, Chap. 2, U. S. Comp. Stat. 1901, p. 1541.

The only essential difference between these two provisions is that in the case of a railroad selection the statute requires the approval of the Secretary. This brings all suits arising under and in accordance with the provisions of the forest lieu selection act within direct range of the doctrine announced and the principles laid down in the case of Weyerhaeuser v. Hoyt, 219, U. S. 380, above cited. This very contention was supported by the Interior Department itself in the recent case of Santa Fe Pacific Railroad Co., 41 L. D. 96, 98. In said case the First Assistant Secretary held as follows:

"The state relies largely upon the language found in the case of Sjoli v. Dreschel (199 U. S. 564), but without giving extended consideration thereto it is sufficient to say that said decision was explained and distinguished in the more recent case of Weyerhaeuser v. Hoyt (219 U. S. 380), and from the latter decision it may be fairly deduced that a selection requiring departmental approval is from the date of its filing an appropriation of the land selected, and that when approval is given its relation is of the time of its filing."

Santa Fe Pacific Railroad Co., 41 L. D. 96, 98 (June, 1912).

Even, therefore, if the court should read into the statute of June 4, 1897, the requisite of departmental approval as a condition to the vesting of any interest, nevertheless under the decision last cited, the land selected is segregated from the public domain and is therefore not open to entry pending such approval or disapproval, and it is admitted in the case at bar that the entry of the appellee was made long before the final decision of the Interior Department arbitrarily overruling its prior holdings and revoking Daniels' rights, and long after the making of Daniels' lieu selection.

As above stated, the case of Weyerhaeuser v. Hoyt proceeds upon the theory that Congress intended to confer upon the Railroad Company a substantial right to select land within the indemnity limits in lieu of lands lost within the place limits. Does the Act of June 4, 1897, which Act is presented for consideration at this time, purport to confer such a substantial right? To hold otherwise would be to render the statute itself meaningless, and would in the language of Chief Justice White in the Weyerhaeuser case above cited not only "destroy the right which it was the purpose of Congress to confer," but would also "be destructive of the right of selection."

In order to combat the clear, lucid and elementary principles laid down in the case of Weyerhaeuser v. Hoyt above cited, and to avoid, if possible, the application of those principles to the

case at bar, it was argued upon the hearing and maintained by the court that the objects, purposes and results contemplated by the Act of June 4, 1897, were entirely different from the objects, purposes and results contemplated by the granting act and joint resolution presented for consideration in the case of Weyerhaeuser v. Hoyt. It was contended and held that the act involved in the latter case amounted to a grant and that the right of selection therein given was in exchange for a vested right of which the railroad had been deprived, while on the other hand the Act of June 4, 1897, was a mere standing offer upon the part of the Government to give to the owner of lands included within the limits of a forest reservation the right to select other land in lieu thereof, the selector not being deprived, however, of any vested right for the reason that he was under no obligation to select land elsewhere and could continue if he so desired to possess his holdings within the forest reservation; and that since the right of selection was in the nature of a contract offer, the Government could accept or reject the offer at its will.

The fallacy of this theory as formulated is shown by its mere enunciation.

In the first place, the distinction which the theory attempts to support is negatived by the very holdings made in the case of Weyerhaeuser v. Hoyt. In that case Justice White, referring to the earlier decision of Oregon & California Railroad Co.

v. United States, 189 U. S. 103, 112; 47 L. Ed. 726, 731, for the purpose of determining the inherent character of a selection made under the Act there presented for consideration, adopted the following quotation:

> "Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd numbered sections within its place or granted limits, which interest relates back to the date of the granting act, the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the land department, and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make."
>
> Weyerhaeuser v. Hoyt, 219 U. S. 380, 391; 55 L. Ed. 258, 263.

It is apparent from the language last quoted, that the right of selection conferred upon the Railroad Company was not only not a grant, but that it did not rise even to the dignity of a contractual relation, which according to the contention of the solicitors for the appellee and of the trial court, was conferred by the Act of Congress of June 4, 1897, giving to the owner of lands within a forest reservation the contract right to select any other public land in lieu thereof. The language above quoted holds expressly that up until the date of selection the Railroad Company acquired no interest

whatsoever in the selected land, and so free was such land from any individual interest whatsoever, that prior to a selection the Government could make any disposition of the land which it might see fit. Furthermore, the very language quoted points this out as a basic distinction between lands within indemnity limits and lands within place limits. How, then, can it be logically argued for a single moment that under the acts presented for consideration in the case of Weyerhaeuser v. Hoyt, the Railroad Compay acquired any higher or better rights of selection than the owner of forest reservation land acquires under the Act of June 4, 1897!

Indeed, it is very apparent that Congress has bestowed upon the owner of land within a forest reservation a greater right to the lieu land than was conferred upon the Railroad Company by the act construed in the case of Weyerhaeuser v. Hoyt above cited, because the very contention which the solicitor for the appellee urged in attempting to distinguish the case of Weyerhaeuser v. Hoyt from the present case, admits that from the date of selection a contractual relation is established between such an owner of land within a forest reservation and the United States Government.

Furthermore, the Railroad Company acquired absolutely no interest in lands granted, which had been otherwise reserved, sold or granted prior to the railroad grant, for the reason that these prior sales made it impossible for any title to said por-

tions of the land to vest in the Railroad Company. It therefore follows that the Railroad Company had been deprived of no vested right, while on the contrary the owner of land within a forest reservation had at least been constructively deprived of a vested interest, by virtue of the act which enclosed his land within the limits of a forest reservation.

In the second place, if the contention urged by the appellee and sustained by the court, to the effect that the statute of June 4, 1897, constitutes a standing offer on the part of the Government to give land in exchange for land embraced within a reservation, then it follows that whenever this offer is accepted by virtue of a selection there is immediately created a vested right, of which the selector can not be deprived unless perchance he has failed to conform to some one of the conditions precedent which must accompany his acceptance of the outstanding offer. This latter proposition is supported by a decision of the Supreme Court of the United States in the case of Roughton v. Knight, 219 U. S. 537. Justice Lurton quoting from the Secretary of the Interior, used the following language in the case last referred to:

"No contract arises until a selection is made and the conveyance of the base tract filed in the land department. Under the Act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the ex-

change. Until that time the exchange is not initiated and is merely a purpose in the private owner's mind."

Roughton v. Knight, 219 U. S. 537, 548; 55 L. Ed. 326, 328.

If, therefore, it be held that the Act of June, 4, 1897, does not in itself constitute a grant of lands without a reservation in lieu of lands included therein, but is on the contrary an open standing offer on the part of the Government constituting a contractual relation, then the moment this offer is accepted a right is initiated, the offer and acceptance are complete, and it only remains for the officer upon whom the duty devolves, to determine whether or not the selection is in all respects regular. It is admitted in the case at bar that a deed to the land within the forest reservation was made and executed. It is further admitted that an abstract of title showing the grantor to be the owner in fee simple of the land so deeded was presented, together with the deed. It is further admitted that a forest lieu selection of the lands in controversy in this case was made. It is further admitted from the face of the amended pleading as is shown by the decision of the Secretary of the Interior, as well as by the three respective acts of approval of these selections by the Land Department, that the selection was in all respects regular. In face of these admitted facts, how can it be argued that the individual who is first in right in all particulars can

be deprived of that right! As was said by the Secretary of the interior himself:

"It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the secretary had been carried out it would have been done before the case became complicated by the counter equitable considerations arising upon the unfortunate allowance of the homestead and timber and stone entries for most of these lands."

Appellant's Transcript of Record, page 32.

Daniels did all that he could do. He accepted the offer presented by the statute. He conformed to the requirements of the Secretary of the Interior. He did all that he was able to do, but because of the "**unfortunate**" action of the governmental officers he is to be depirved of all his rights. Fortunately, however, this is contrary to the well established principles of law long ago announced by the highest tribunal in the land:

"It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him."

Lytle v. The State of Arkansas, 9 How. 314, 332.

In the third place, the intention of Congress as evidenced by an amendment to the Act of June 4, 1897, as well as the reasons which led to the passage

of the Act clearly establish that it was the intention of Congress to confer upon the owner of land embraced within a forest reservation, a substantial right to select other unoccupied public land in lieu of the land so included. This makes the present case one wherein each and every principle announced in the case of Weyerhaeuser v. Hoyt above cited should be applied. If these principles are so applied then it will have to be admitted that every question in the case at bar has already been determined by the court of last resort.

The Act of June 4, 1897, was amended in 1900, which amendment provides that the selections contemplated by the Act:

> "Shall be confined to vacant, surveyed, non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim or patent; provided, that nothing herein contained shall be construed to affect the rights of those who, previous to October 1, 1900, shall have delivered to the United States deeds for lands within forest reservations and made application for specific tracts of lands in lieu thereof."
>
> 31 Stat. at L. 614.

The proviso just cited states in language which possesses no semblance of ambiguity, that the execution of the deed and the making of a selection creates a substantial right. To hold otherwise, would be to render the provision meaningless.

Again, the Act of Congress which repealed the

Act of June 4, 1897, contained the following proviso:

"Provided, that selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issued therefor the same as though this act had not been passed; and if for any reason not the fault of the party making the same any pending selection is held invalid, another selection for a like quantity of land may be made in lieu thereof."

33 Stat. at L. 1264, Chap. 1495; U. S. Comp. Stats. Supp., 1909, p. 581.

This proviso merely confirms the intention of Congress to confer a subsantial right and needs no comment.

If no such proviso existed, however, and we were left entirely dependent upon the Act of June 4, 1897, itself, it is clearly apparent from the face of the Act that Congress intended to confer upon the owners of land included within a forest reservation a substantial right to select other unoccupied public land in lieu thereof. The reasons for the passage of this forest lieu selection act were very clearly elucidated and expounded by Mr. Justice Lurton in the recent case of Roughton v. Knight, 219 U. S. 537.

In this connection we direct the court's attention to the following language of the learned Justice:

"Upon its face the act is neither more nor less than a proposal by the government for an exchange of claims

to land unperfected, or lands held under patents, situated within the exterior lines of a forest reservation, for an equal area of public land subject to entry elsewhere. The reasons for the provision are found in the disadvantages which result to such a settler or owner who had acquired his lands before the creation of a reservation in the public lands surrounding him. He was thereby isolated from neighborhood association and deprived of the advantage of schools, churches and of increasing value to his own land from occupation by others of the lands thus devoted to reservation purposes."

Roughton v. Knight, 219 U. S. 537, 546; 55 L. Ed. 326, 327.

As already stated, it was argued at the hearing of the demurrer to appellant's amended bill of complaint that the owner of land within a forest reservation was under no obligation to accept the offer covered by the Act of June 4, 1897, and could continue, if he so desired, to remain in ownership and possession of his land regardless of its inclusion within a forest reservation. Carrying this argument to its ultimate conclusion, it was contended that the holder of such reservation land was not therefore deprived of any vested right, and that the action of the Secretary of the Interior, with reference to the acceptance or rejection of an application for lieu land was an arbitrary power vested in him by law to be exercised at will; and he could bestow upon the lieu selector, if he so desired the gratuity which the Government offered by virtue of the Act of June 4, 1897. Whether Congress by virtue of the

Act of June 4, 1897, proposed to bestow upon the owner of lands within a forest reservation a mere gift or gratuity or whether it intended to confer upon him a substantial right of some kind is the vital question in this case.

If a gratuity was contemplated, however, then the Act of June 4, 1897, is a useless statute. It is merely an incumbrance upon our books. For if a gratuity was contemplated and the Secretary of the Interior was vested with the role of a Santa Claus to present this gratuity or withhold it at his will, the Government would merely have had to proceed with the creation of forest reservations and bestow the right of selection on those only who invited and invoked its sympathy. If the Government intended to relieve those only, whom the Secretary should designate, then it need not have passed the Act of June 4, 1897.

To argue that an individual who is deprived of a proper and adequate use of his land, but still possesses the land, has thereby lost nothing, is to argue that since matter is indestructible, the man whose house has been destroyed by fire has lost nothing, because he still possesses all of its original elements in the form of ashes.

The very fact that Congress passed and put into effect the Act of June 4, 1897, establishes beyond any possible doubt its own recognition of the deprivation which would result to an owner of land within a forest reservation, and its intention to

grant him in lieu thereof not a vague, mythical, inchoate right to obtain land elsewhere, but a definite, fixed and substantial right to select any other land which might be open to entry. Congress, of course, realized the isolation which would result from the barrier of a forest reservation. The deprivation of schools, churches, occupation and association by others and of all things which tend to give value to land, must inevitably follow the creation of such a barrier. It is a matter of common knowledge of which all courts will take judicial notice that many a tract of land within close range of a densely populated city, is valueless because of its inaccessibility. To deprive an individual of the value and use of his land is a greater deprivation than to deprive him of the land itself. In the latter instance he is deprived of the naked commodity, but no obligations flow from the deprivation, while in the first instance he still possesses the commodity, but has in addition thereto the constant expense of repair, keep and taxes.

It is therefore the contention of the appellant that the Act of June 4, 1897, conferred upon all owners of lands within forest reservations a substantial right to select in lieu of the land of which they were deprived any vacant, unoccupied land within the public domain, and that when, as in the case at bar, a selection of the lieu land has once been made, there is thereby initiated a right and interest of which the selector can not thereafter

be deprived save by his own failure to conform to the requirements of the statute from which this right emanated; that from the date of the initiation of this right the land over which the right has been exercised is thereby segregated from the public domain to the exclusion of all other interests pending the decision of the governmental officer in whom is vested the power of approval or rejection, if such approval is necessary; that when such power of approval or rejection is once invoked he is bound to determine not whether the lieu selector should be given a preference over a subsequent entryman, but whether the lieu selector has in all respects conformed to the law, for as stated by Mr. Justice White in the case of Weyerhaeuser v. Hoyt:

"The requirement of approval by the secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending the action of the secretary."

Weyerhaeuser v. Hoyt, 219 U. S. 380, 388; 55 L. Ed. 258, 261.

The language last quoted is directly in conflict with the following language of the Secretary upon which the appellee's entire title is based:

"It is believed that these applications might have been allowed not as a matter of right but in the discretion of the Secretary of the Interior, and if the instructions of the secretary had been carried out it would have been done." * * *

Appellant's Transcript of Record, page 59.

Furthermore, the Secretary's final holding in this particular was not only in direct conflict with the holding of the Supreme Court as just cited, but in direct conflict with his own prior holdings and rulings in approving the selections in question upon two different occasions.

The question to be determined in this case presents not only a far reaching proposition involving thousands of acres of the public land, but presents in addition a Federal question, such as to warrant an appeal to the Supreme Court of the United States. As above stated, the determination of the rights here involved depend upon whether or not the Act of June 4, 1897, confers a substantial right. A construction of this Act, which would support the contention of the appellant that the statute does confer a substantial right to select lands in lieu of lands lost within a forest reservation, would sustain the right of the appellant to maintain the present suit, and on the other hand a construction of the same Act to the effect, as maintained by the Secretary of the Interior, that under it the allowance of a selection is within his discretion, would defeat the present suit. Under such circumstances it is held that a Federal question is presented:

"If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. Doolan v. Carr,

125 U. S. 618 (31 L. Ed. 844); Cooke v. Avery, 147 U. S. 375 (37 L. Ed. 209)."

Northern Pacific Railroad Company v. Soderberg, 188 U. S. 526, 528; 47 L. Ed. 575, 581.

The few cases in which this question is now presented to this court for determination, constitute but a very small part of the instances wherein the same difficulty has arisen throughout the entire United States. The injury which the appellant in this case has suffered is undoubtedly very small in comparison to the injuries which have been suffered by many poor people whose entries have been embraced within forest reservations. The trial court in the case at bar in his endeavor to distinguish the doctrine laid down in the case of Lytle v. State of Arkansas above cited, to the effect that whenever an individual in the prosecution of a right has conformed to all the requirements of the law, he should not be deprived of his rights by virtue of the erroneous action of any governmental officer, argued that this doctrine applied only in cases of homestead and pre-emption entries, upon the theory that the government had always been tender as regards the rights of such entrymen. (Transcript of Record, page 21, in Case of Daniels v. Wagner, No. 2217.)

Such argument limits itself to the narrow confines of the present cases. The effect of the ruling to be here announced and the construction to be adopted cannot be limited to this appellant. Simply because there is nothing in the present case to

show that this appellant made a homestead entry on the base lands involved in this case does not go to prove for a single moment that many homestead entries have not been made upon lands which are now embraced within forest reservations. Furthermore, there is nothing in the present case to show that the forest reservation land here involved was not originally taken up as a homestead entry. It therefore logically follows that in the determination of the question here involved it is, theoretically at least, homesteader against homesteader, and such being the case how can it be logically argued or legitimately held that the rule which protects the homesteader in one instance, where he has been deprived of rights which he has legitimately earned by conforming to the law, should not be applied in other instances where he has lost a vested right?

It is indeed a sad spectacle to travel through a forest reservation and see a few isolated homesteaders who have made their entries in hopes of future increases in value by virtue of neighborhood associations, now entirely cut off not only from associations contemplated but from all associations. To allow the rule of law which has been adopted in this case to remain in effect is to hold that many of these unfortunate entrymen, whose rights have been thus jeopardized and whose future has been blighted, can only obtain relief as the arbitrary will of the Interior Department may direct, regardless

of the act of Congress in passing a statute for their protection.

In fact, to confirm the decree in the present case is to hold that the owner of land within a forest reservation who has deeded his interest back to the United States under and in accordance with the provisions of the act of June 4, 1897, can, if the Secretary of the Interior so desires, be prevented from ever selecting any other public land in lieu of that which he has deeded to the government. He might attempt to make a selection today which the secretary could deny tomorrow, and so on without end. The opportunity which this would open for the juggling of such rights is a fact which becomes apparent by merely attempting to put into practice the doctrine which the decree of the lower court establishes. It may be that such a case is an isolated and extreme one, but by such extreme cases the practical effect of a ruling may be oftentimes best tested.

It may be contended that these observations are not applicable to the case at bar, but courts whose decisions are of such far-reaching effect as are the holdings of this court, must take such matters into consideration in adopting and laying down a rule of property which is to affect so many individuals, as will be affected by the decision which is to be rendered herein.

In view of these considerations and in view of the further consideration that the question here pre-

sented is clearly a federal question, we respectfully urge that these questions and propositions of law be certified by this court to the Supreme Court of the United States as provided by section 239 of the Act of March 3, 1911, 36 Stat. at L. 1157.

Respectfully submitted,

PLATT & PLATT,
Solicitors for Appellant.

No. 2222

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. D. DANIELS . . . . . Appellant

vs.

JOHN C. LEONARD ET AL . . . . Appellees

BRIEF OF APPELLEES

John C. Leonard, Vestal W. Wakefield, Valentine Bernhard and Mark T. Howard

Upon Appeal from the United States District Court for the District of Oregon

STATEMENT OF CASE

The above entitled suit embraces some sixteen cases wherein A. D. Daniels, claimant of beneficial interest in and to certain forest lieu selections, is endeavoring, by means of this suit in equity, to have the various timber and stone and homestead claimants, to whom the lands involved have been regularly patented by the United States, declared to hold the legal title to said lands in trust for the plaintiff. This brief is being filed on behalf of defendants

John C. Leonard, Vestal W. Wakefield, Valentine Bernhard and Mark T. Howard, the remainder of the defendants being represented by other counsel.

On the 8th day of February, 1904, Edward B. Perrin and Aztec Land and Cattle Company, Ltd., through L. T. Barin, agent (A. D. Daniels, appellant, being claimant of beneficial interest), filed their relinquishments of lands owned by them in the San Francisco Mountains Forest Reserve, Arizona, and made application at the United States Land Office, Lakeview, Oregon, to select in lieu of the relinquished lands the lands patented to the above-named defendants, together with other lands, and said applications were rejected because the lands embraced in such applications were embraced in State of Oregon School Land Indemnity Selection Lists Nos. 178 and 188, standing uncancelled upon the records of the said land office. Appeal was taken from this rejection and such proceedings were thereafter had, as detailed in the final decision of the Honorable Secretary of the Interior dated February 17, 1910, attached to the amended bills of complaint and made a part thereof and incorporated therein and marked plaintiff's Exhibit "A," that on May 15 and 18, 1907, the Honorable Assistant Secretary of the Interior rendered his decision awarding the preference right of entry to plaintiff. Up to this point, as will appear fro man inspection of plaintiff's amended bills of complaint, to-wit, Exhibit "A" attached to and made a part of each of said bills, the proceedings in the Interior Department were wholly ex parte. Upon rendering the decisions of May 15 and 18, 1907, the cases were remanded back to the local land office with directions to notify all persons who had made entry subsequently to

the cancellation of said Indemnity Lists to show cause why their entries should not be cancelled for conflict with the lieu selections, whereupon certain of the homestead and timber and stone claimants filed a petition for a re-review of Departmental decisions of May 15 and 18, 1907, and charged that there was a conspiracy between the plaintiff and certain other persons to defraud the United States of the lands embraced in the lieu applications and that plaintiff was endeavoring to acquire the lands through fraud.

Pursuant to the prayer of this petition the department, under date of August 10, 1907, ordered a hearing where all parties could present their cases upon the merits, all the prior proceedings being purely ex parte, and pursuant thereto a hearing was regularly had before the Register and Receiver at the Lakeview, Oregon, land office on May 25, 1908, all parties being present in person or by their respective attorneys and presenting evidence to sustain their contentions. The decision of the Register and Receiver, as a result of this hearing, awarded the lands to the homestead and timber and stone claimants and plaintiff herein appealed to the Honorable Commissioner of the General Land Office who, under date of April 13, 1909, rendered his decision awarding the lands to plaintiff, whereupon the defendants appealed to the Honorable Secretary of the Interior. The Secrtary,u ndr date of February 17, 1910, rendered an exhaustive opinion awarding the lands to the homestead and timber and stone claimants. (See Exhibit "A" at page 20, Transcript). May 23, 1910, this last mentioned decision was reviewed by the Secretary of the Interior and he adhered to his former decision of

February 17, 1910, and thereafter, on various dates, all the lands embraced in this suit were patented by the United States to the defendants under the homestead and timber and stone laws.

Plaintiff contends that the action of the Secretary of the Interior was erroneous; that he committed error in law when he awarded the lands to the defendants, and that a court of equity should assume jurisdiction to correct this error and declare the patentees to be trustees of the legal title to the lands for the use and benefit of the plaintiff. Dfendants contend that the Secretary of the Interior did not commit error as alleged, and they further contend that the decision of the United States District Court for Oregon, rendered in the case of A. D. Daniels vs. Jessie E. Wagner, 194 Fed. 973, was correct and should be affirmed.

POINTS AND AUTHORITIES

No vested right is acquired by the mere offer to file a forest lieu selection which is rejected.

Cosmos Exploration Co. vs. Gray Eagle Oil Co., 47 L. ed., 1070; 190 U. S., 301;

Roughton vs. Knight, 219 U. S., 536; 55 L. ed., 326·

Clearwater Timber Co. vs. Shoshone Co., 155 Fed., 612;

Osborn vs. Forsyth, 216 U. S., 570; 54 L. ed., 619;

Pacific Live Stock Co., vs. Isaacs, 96 Pac. (Ore.), 464;

Robinson vs. Lundrigan, 178 Fed., 230; 101 C. C. A., 590;

Miller vs. Thomas, 36 L. D., 492;

Thomas B. Walker, 36 L. D., 495;
Sherar vs. Frazer, 40 L. D., 549;
La Fayette Lewis, 33 L. D., 43;
William E. Moses, 33 L. D., 333;
Smith vs. State, 40 L. D., 554;
Instructions, 24 L. D., 589, 592;
Instructions, 30 L. D., 28;
Kern Oil Co., vs. Clarke, 30 L. D., 550, at p. 569; 31 L. D., 288;
Gray Eagle Oil Co. vs. Clarke, 30 L. D., 570;
Charles H. Cobb, 31 L. D., 220;
Santa Fe Pac. R. R. Co. vs. State, 34 L. D., 12;
Thomas B. Walker, 36 L. D., 495;
Sherar vs. Veazie, 40 L. D., 549 (Feb. 8, 1912);

The administration of the Forest Reserve Lieu Land Act of June 4, 1897 (30 Stat., 11, 36), as amended by subsequent Acts of Congress, is vested in the land department of the United States.

Cosmos Exploration Company vs. Gray Eagle Oil Company, 112 Fed. 4; 50 C. C. A., 79; 61 L. R. A., 230;
Same case, 47 L. ed., 1070; 190 U. S., 301;
Roughton vs. Knight, 55 L. ed., 326; 219 U. S., 536;
Same case, 156 Cal., 123; 103 Pac., 844;
Wisconsin Cent. R. R. Co. vs. Price Co., 133 U. S., 460; 33 L. ed., 687;
Regulations of Int. Dep't. under Act June 4, 1897, found in 24 Land Decisions, pages 589, 592;
Pacific Live Stock Company vs. Isaacs, 96 Pac. (Ore.), 464;
Catholic Bishop of Nasqually vs. Gibbon, 158 U. S., 155; 39 L. ed., 931;
Knight vs. Land Association, 142 U. S., 161, 177;

Clearwater Timber Company vs. Shoshone County, 155 Fed., 612;
Kern Oil Co. et al. vs. Clarke, 30 L. D., 550;
In re C. W. Clarke, 32 L. D., 233, at page 235;
Miller vs. Thompson, 36 L. D., 492:

The decisions of the land department upon questions of fact are conclusive.

Johnson vs. Townsley, 20 L. ed., 485;
Shepley vs. Cowan, 23 L. ed., 424;
Marquez vs. Frisbie, 25 L. ed., 800;
Quimby vs. Conlan, 26 L. ed., 800;
Burfenning vs. Chicago, etc., 41 L. ed., 175;
De Cambra vs. Rogers, 47 L. ed., 734;
Whitcomb vs. White, 53 L. ed., 891.

Likewise its decisions upon mixed questions of law and fact.

Quimby vs. Conlan, supra;
Whitcomb vs. White, id.

The acts of the executive departments of the Government, when acquiesced in, and especially their interpretations of statutes which they are called upon almost daily to construe, if acquiesced in for a long time, are almost conclusive upon the courts.

Roughton vs. Knight, 219 U. S. 536; 55 L ed., 326;
Osborn vs. Forsyth, 216 U. S., 570; 54 L. ed., 619;
Orchard vs. Alexander, 157 U. S., 373;
Knight vs. Land Association, 142 U. S., 161, 177;
Parsons vs. Venzke, 164 U. S., 89;
Williams vs. U. S., 138 U. S., 514, 524;

Kern Oil Co. vs. Clarke, (on review), 31 L. D., 288 at p. 300;
Pacific Live Stock Company vs. Isaacs, 96 Pac. (Ore.), 464.

The Secretary of the nIetrior is vested with large discretionary powers in the administration of our public land system.

Williams vs. U. S., 138 U. S., 514, 524;
Knight vs. Land Asso., 142 U. S., 161, 177;
Fowler vs. Dennis, 41 Land Decisions (April 28, 1912), 175.

The Act of June 4, 1897, contemplates a common law exchange of equal estates, which requires the assent of both parties thereto before the exchange is consummated.

See Co. Litt., 50a, 50b, 51a and 51b, Butler and Hargrave's Notes;
Shep. Touch., 294;
Words & Phrases, Vol. 3, page 2547;
Clearwater Timber Co. vs. Shoshone Co., 155 Fed., 612;
Lessieur vs. Price, 12 How., 59, 74;
Roughton vs. Knight, 156 Cal., 123; 103 Pac., 844;
Id., 219 U. S., 536; 55 L. ed., 326;
La Fayette Lewis, 33 L. D., 43;
William E. Moses, 33 L. D., 333;
F. A. Hyde et al., 28 L. D., 286, 290;
Opinion Asst. Atty-Gen. Van Devanter, 28 L. D., 312;
Id., 28 L. D., 472;
Id., 30 L. D., 105;
Kern Oil Co. et al. vs. Clarke, 30 L. D., 550;

Id., on review, 31 L. D., 288, at page 294;
Gray Eagle Oil Co. vs. Clarke, 30 L. D., 570;
Instructions, 31 L. D., 225;
In re C. W. Clarke, 32 L. D., 233, at p. 235;
Miller vs. Thompson, 36 L. D., 492;
Smith vs. State of Idaho, 40 L. D., 554.

In case of rejection of lieu land applications the base lands are not lost.

La Fakette Lewis, 33 L. D., 43, at pp 66, 75;
Kern Oil Co. et al. vs. Clarke, 30 L. D., 550, at p 561;
William E. Moses, 33 L. D., 334;
Geo. Austin, 33 L. D., 589;
Fred A. Krebs, 37 L. D., 143;
Smith vs. State of Idaho, 40 L. D., 554;
Clearwater Timber Co. vs. Shoshone Co., 155 Fed., 612;

The selector of land under the exchange provisions of the Act of June 4, 1897, is the owner of the base land and must pay taxes thereon until the selection is approved by the Commissioner of the General Land Office and the exchange consummated.

La Fayette Lewis, 33 L. D., 43;
William E. Moses, 33 L. D., 333;
Cosmos Exploration Co., vs. Gray Eagle Oil Co., 190 U. S., 301; 47 L. ed., 1070;
Clearwater Timber Co. vs. Shoshone Co. et al., 155 Fed., 612, at pp. 628 and 632;
Sjorli vs. Dreschel, 199 U. S., 564; 50 L. ed., 311;
Grant vs. Railway Co., 7 N. W., 113; 54 Iowa, 673;
Musser vs. McRae, 38 N. W., 103; 38 Minn., 409;
Page vs. Price Co., 64 P., 801; 25 Wash., 6;

Plaintiff should have brought mandamus against the Secretary of the Interior when the selections were finally rejected.

Osborn vs. Forsyth, 216 U. S., 570; 54 L. ed., 619.

The decisions of the Interior Department construing the laws specially intrusted to it for execution, and the rules and regulations promulgated by it in the discharge of its duties, should not be disturbed or reversed except for the most cogent reasons.

U. S. R. S. 441, 453 and 2478;
Knight vs. Land Asso., 142 U. S., 161, 167;
Orchard vs. Alexander, 157 U. S., 372, 375;
Catholic Bishop of Nasqually vs. Gibbon, 158 U. S., 155, 166;
Parsons vs. Venzke, 164 U. S., 89, 91;
Gray Eagle Oil Co. vs. Clarke, 31 L. D., 303, at p. 306;

Lands suspended from entry, or reserved by competent authority, and lands occupied or covered by an entry, selection or filing, or mineral lands, are not subject to selection under the exchange provisions of the Act of June 4, 1897, (30 Stat., 11, 36).

Leaming vs. McKenna, 31 L. D., 318;
Kern Oil Co. vs. Clarke, 31 L. D., 288;
Wilcox vs. Jackson, 13 Pet., 498, 513;
Walcott vs. Des Moines Co., 5 Wall., 681, 688;
Grisor vs. McDonald, 6 Wall., 363, 381;
Cal. Or. Land Co. et al., 33 L. D., 595;
Santa Fe Pac. R. R. Co. vs. State of Cal., 34 L. D, 12;
In re Santa Fe Pac. R. R. Co., 34 L. D., 119.

The decision of the Secretary of the Interior in the cases at bar followed a long line of decisions rendered by his predecessors.

Kern Oil Co. vs. Clarke, 30 L. D., 550;
Instructions, 24 L. D., 589, 592;
Gray Eagle Oil Co. vs. Clarke, 30 L. D., 570;
Gary B. Pavey, 31 L. D., 186;
Charles H. Cobb, 31 L. D., 220;
Porter vs. Landrum, 31 L. D., 352, at pp. 353, 354.

The regulations promulgated by the Secretary of the Interior in pursuance of statute, have all the force and effect of law.

2 L. D., 709; 5 L. D., 169; 6 L. D., 111; 9 L. D., 86, 189, 284, 353;

The law deals tenderly with the settler upon public lands.

Ard vs. Brandon, 156 U. S., 537, 543; 39 L. ed., 524,526;
Shepley vs. Cowan, 91 U. S., 330, 338; 23 L. ed., 424, 427.

The Courts of the United States take judicial notice of the regulations of the land department.

Caha vs. United States, 152 U. S., 211; 38 L. ed., 415.

The final decision of the Interior Department of February 17, 1910, shows that the selections were never ac-

cepted by the land department, notwithstanding allegations in other parts of the amended bills of complaint to the contrary.

See Exhibit "A" attached to and made part of each amended bill of complaint.

The fact plaintiff was awarded a decision by the Interior Department, prior to the final decision of February 17, 1910, in favor of defendants, gives him no standing, since the final decision alone determines the rights of the parties.

Potter vs. Hall, 189 U. S., 292 · 47 L. ed., 819.

ARGUMENT

The particular point involved in this appeal, and which will be decisive of the case, is whether or not A. D. Daniels, when he presented his applications to make forest lieu selections at the United States Land Office at Lakeview, Oregon, February 8, 1904, together with the requisite abstract of title to the lands relinquished to the Government in the San Francisco Mountains Forest Reserve, which formed the basis of the selections, acquired such a vested right that the Interior Department could not ignore it, and without approval of the selection by the department, award the land to actual settlers and timber and stone claimants.

At the time the applications were presented, that is, on February 8, 1904, the lands embraced in the patents to Wakefield, Leonard, Barnhard and Howard, together with

other lands in controversy, were embraced in state of Oregon School Land Indemnity Selection Lists Nos. 178 and 188, which were on that date uncancelled upon the records at Lakeview, and the Register and Receiver of that office promptly rejected the forest lieu applications in pursuance of the regulations of the Interior Department and the practice of the various local land offices over the country in like cases, and the plaintiff and his predecessors in interest appealed from the action of the Register and Receiver to the Commissioner of the General Land Office. March 4, 1904, the state's relinquishment to School Land Indemnity Lists 178 and 188 was filed at Lakeview, but prior to final approval of the selections by the Commissioner of the General Land Office various individuals made applications to enter the lands under the provisions of the homestead and timber and stone laws of the United States and their entries were placed of record at Lakeview. The plaintiff and appellant contends that they acquired no rights by reason of having their filings allowed and subsequently procuring patents to issue to their claims, but that he, appellant, acquired a vested right by the mere offer to file his lieu applications on February 8, 1904, at the land office, which should have precluded the allowance of entries to subsequent applicants.

It has been the practice of the land department since the Act of June 4, 1897, was first passed to allow filings, selections and entries for lands embraced in lieu land applications up to the time the applications were approved by the Commissioner of the General Land Office. The regulations promulgated June 30, 1897, for administering and carrying into effect the Act of June 4, 1897, 24 Land De-

cisions, page 589 (at page 592), provide, in Rules 16 and 18 thereof:

> "16. Where final certificate or patent has issued, it will be necessary for the entryman or owner thereunder to execute a quit-claim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for.
>
> "18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with report as to the status of the tract applied for."

It will be seen that the above rules promulgated by the Honorable Secretary of the Interior for administering the Act of June 4, 1897, did not vest the local land officers with discretion or authority to accept and file or reject applications to make exchange under the provisions of said Act of June 4, 1897, but such applications for change must "be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with report as to the status of the tract applied for," where the original and first decision as to whether or not they should be allowed was made. The mere filing of the application did not have the effect to segregate the land from other disposition, but only the approval of the selection by the Commissioner of the General Land Office could have that

effect. This was a very reasonable rule to carry into practical effect the Forest Lieu Act because if the lieu selector should find that the land he applied to select was taken by a settler prior to approval by the Commissioner of the General Land Office he could select any other land at any place in the vast public domain of the United States which was vacant, public land, not mineral, and not occupied. Furthermore, the Act of June 4, 1897, provides that "no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected," and in case of the final rejection of the application to select the selector is still the owner of the base land and loses nothing by the final rejection except the privilege of making the exchange of land for land which does not become consummated until approved by both parties thereto, one of such parties being the applicant to select and the other the Commissioner of the General Land Office. And the contention that the base lands, because within the exterior limits of a national forest, are inaccessible and valueless, is without merit, because the increased range facilities for raising stock in the forest reserve adds greatly to the value of privately owned land within the national forests.

As said in Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S., 301; 47 L. ed., 1070, at page 1070:

> "There can be, as we think, no doubt that the general administration of the forest reserve act, and also the determination of the various questions which may arise thereunder before the issuing of any patent for the selected lands, are vested in the Land Department. The Statute of 1897 does not in terms refer any question that might arise under

> it to that department, but the subject-matter of that act relates to the relinquishment of land in the various forest reservations, to the United States, and to the selection of lands in lieu thereof, from the public lands of the United States, and the administration of the act is to be governed by the general system adopted by the United States for the administration of the laws regarding its public lands."

Justice Peckham in the case last above quoted from proceeds to state that the Land Department has jurisdiction of all questions incident to the administration of the public land system and that it has jurisdiction of matters involving the right of parties to make selections under the act and that the Commissioner of the General Land Office and the Secretary of the Interior have jurisdiction, on appeal, to review all the acts of the local land officers in the various land offices distributed over the public land states,citing to that end, among other cases, Catholic Bishop vs. Gibbon, 158 U. S., 155, 156, 167; 39 L. ed., 931, 936; Orchard vs. Alexander, 157 U. S., 372; 39 L. ed., 737, and then proceeds thus:

> "The Land Department also has power to adopt and did adopt, rules and regulations for the administration of the forest reserve act. The power existed by virtue of the provisions of the Revised Statutes, ss. 441, 453, and 2478 (U. S. Comp. Stat. 1901, pp. 252, 257, 1586). Courts will take judicial notice of rules and regulations made by the Land Department regarding the sale or exchange of public land. Caha vs. United States, 152 U. S., 211, 221; 38 L. ed., 415. The rules and regulations promulgated by that department for the purpose of

> carrying out the provisions of the act of June 4, 1897, are found in 24 Land Dec. 589, 592, and we think the rules set forth below are reasonable and entitled to respect and obedience as valid rules and regulations,"

After which he quotes rules 16 and 18 of the Regulations of June 30, 1897, made to carry into effect the provisions of said Act of June 4, 1897.

Again,

> "The 'consideration' mentioned in Rule 18, is clearly not of the character of a review of a decision already made by the local land officers, but is in the nature of an original consideration of the subject by the General Land Office, to which office the final decision belongs. The APPLICATIONS are to be forwarded, not a decision by the local land office, together with a report (not a decision) as to the status of the land. This rule makes it the duty of the local land officers merely to forward the various applications to the General Land Office, and an original decision is to be made by the latter office upon the papers transmitted to it."

How can the appellant in these cases, in view of the above decision, claim a vested right which equity could act upon, merely upon the filing of his applications at Lakeview, and this especially when the local officers at that land office rejected the applications and they were never accepted by any of the officers of the Interior Department and were never placed of record as filings? It might be contended with some plausibility that the decisions of the Secretary of the Interior dated May 15 and

18, 1907, decided on a purely ex parte showing by the appellant, in favor of the appellant, should give him the same status as one whose filings were placed of record because the decision was tantamount to placing the filings of record. This cannot be true, however, because the final decision of the Secretary of the Interior alone determines the rights of the parties and all intermediate decisions are swept aside. See Potter vs. Hall, 189 U. S., 292. Furthermone, after the hearing on the merits at the Lakeview land office of May 25, 1908, where all parties interested introduced their testimony, the Secretary of the Interior never rendered a decision in favor of the appellant. (See appellants Exhibit "A" at page 20, Transcript). The Commissioner of the General Land Office, on April 13, 1909, rendered his decision in favor of the appellant, but that decision never became final, because appeal was regularly taken from it to the Honorable Secretary of the Interior, who, February 17, 1910, rendered his final decision in favor of the defendants in this appeal, together with other claimants under the homestead and timber and stone laws. See plaintiff's Exhibit "A" attached to each amended bill of complaint, commencing at page 20 of the transcript in the Leonard, Barnhard, Wakefield and Howard cases.

Again in the Cosmos case last quoted from:

> "We do not see how it can be successfully maintained that, without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land and assuming to select a similar area of vacant land open to settlement, the selector

has thereby acquired a complete equitable title to the selected land. The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it show necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to relinquish, and that the deed conveys a fee simple title to the Government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent for such land. These assertions may or may not be true. Who is to decide? Complainant asserts that if a decision be necessary before the vesting of a complete equitable title, that in that case the local officers are to decide that question, and by accepting the deed and making the certificate already mentioned, they have decided it, and thereupon, at all events, the complete, equitable title accrued, even though such decision were subject to a review by the Commissioner of the General Land Office and thereafter by the Secretary."

It will be noted that in the Cosmos case, above, the selections were actually placed of record at the Visalia, California, land office, whereas in the cases at bar the selections of Daniels were never placed of record at the United States Land Office at Lakeview, Oregon, and this statement in this brief is borne out completely by appellants own amended bills of complaint. See decision of the Secretary of the Interior dated February 17, 1910, attached to

and made a part of each of the amended bills of complaint of appellant, and found in the Leonard, Barnhard, Wakefield and Howard cases at page 20 of the transcript. Yet notwithstanding the fact the selections were entered in the record books of the land office in the Cosmos case, still it was conclusively determined in said case that the selector there acquired no vested or equitable right as against a claimant whose rights intervened at any time prior to the final approval of the selection by the Commissioner of the General Land Office pursuant to rule 18 of the Instructions of June 30, 1897, found in Vol. 24 of the Decisions of the Department of the Interior relating to the public lands, at page 592.

Again, in the same case:

> "Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector so that he became vested with the equitable title to the land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited, that decision has not been made. The

> General Land Office has (so far as this record shows) come to no conclusion in regard to it."

How could the language of a decision be more applicable to the point at issue in a case than the above language is applicable to the case at bar? The very point upon which the decision in the Cosmos case depended was as to whether a vested right accrued upon the attempted allowance of a lieu selection by the local land officers prior to approval by the Commissioner of the General Land Office as required by rule 18 of the Instructions of the Interior Department of June 30, 1897, and that case decided that the offering of the filings, together with the requisite relinquishment of the land in the forest reserve, the non-mineral and non-occupancy affidavits, and the acceptance, or attempted acceptance of such filings by the local land officers, conferred no equitable or vested right upon the selector which a court of equity would protect. It held point blank that no rights could be acquired by a selector under the provisions of the Act of June 4, 1897, until the application to select was approved by the Commissioner of the General Land Office. In the Cosmos case it is made clear why this power of approving selections under the Act of June 4, 1897, was not left to the Registers and Receivers of the local land offices over the public land states. The Registers and Receivers being men, frequently, of mediocre ability, and generally laymen, not lawyers, it was thought that the decision under the complicated machinery provided by the Act for the exchange of lands should be left for decision by the Commissioner of the General Land Office and his corps of trained law clerks. Furthermore, while the exact wording of the act of June

4, 1897, did not vest this right of final decision upon a selection in the Commissioner, still the decision had to be made somewhere and by someone, as stated by Justice Peckham in the Cosmos case, and under the provisions of Sections 451 and 453, as well as 2478 of the Revised Statutes of the United States that jurisdiction was vested in the Land Department, and the Secretary of the Interior being the head of that department, it necessarily devolved upon him to determine who should make the final decision as to the validity of a forest lieu selection, and the Secretary cast the duty, by his said Instructions of June 30, 1897, upon the Commissioner of the General Land Office.

Counsel for appellant in their brief submitted in connection with the amended bills of complaint in the United States District Court, laid great stress upon the case of Weyerhauser vs. Hoyt, 219 U. S., 380; 55 L. ed.. 258. That case involved the validity of a railroad indemnity selection for lands lost to the N. P. R. R. Co. within the limits of its place grant. The selection was made by the Railroad Company October 17, 1883, and remained of record till March 22, 1897, when it was canceled pursuant to the holdings of the Interior Department (23 L. D., 204), which determined Duluth, not Ashland, to be the eastern terminus of the Company's grant. May 26, 1900, the Company's selections were reinstated pursuant to the decision of the United States Supreme Court in Doherty vs. N. P. R. Co., 177 U. S., 421; 44 L. ed., 830, and the timber and stone entry of Jones, allowed by the Register and Receiver December 17, 1897, was canceled by the Secretary of the Interior on the ground that the Department had no right to cancel the Company's selection made

October 17, 1883, the cancellation being based upon the erroneous assumption that the grant of the Company extended only to Ashland, when in fact, as determined by the Supreme Court in Doherty vs. N. P. R. Co., spura, it extended to Duluth. The gist of the decision, which affirms the decision of the Secretary of the Interior and does not disaffirm it as the court is asked to do in this case, was that if the Railroad Company had a right to make the selection in 1883, no attempted cancellation because of erroneous decisions as to the eastern terminus of the road, by the Interior Department should have the effect to destroy that right.

It is submitted that the case of Weyerhaeuser vs. Hoyt, supra, is not in point in the cast at bar because—

1. In the grant to the N. P. Ry. Co. which was involved in that decision no exchange was provided for as was the case in the cases at bar;

2. In the Weyerhaeuser case the Supreme Court affirmed the action of the Secretary of the Interior holding valid the Company's selections, whereas in these cases the court is asked to assume that the action of the Secretary of the Interior upon the law and the facts was erroneous;

3. In the Weyerhaeuser case the Company had but a limited area in which to make indemnity selections and might have lost the base entirely by being unable to make selections in the two indemnity limits given it, whereas in the cases at bar Daniels loses nothing by the rejection of his scrip applications, the whole public domain of the United States being open to his right of selection till the repeal of the Act of June 4, 1897, dated March 3, 1905 (33 Stat., 1264).

4. In the Weyerhaeuser case the base, if not supplied from the indemnity limits, would have been lost, whereas in the cases at bar the base land is never lost till the completion of the exchange after approval of the Commissioner of the General Land Office; it being competent for Daniels, at this or a later date, to repossess himself of the base lands in the San Francisco Mountains Forest Reserve which formed the bases for these selections. (See Clearwater Timber Co. vs. Shoshone County, 155 Fed., 612; La Fayette Lewis, 33 L. D., 43; William E. Moses, 33 L. D., 333, and cases heretofore cited in this brief).

Furthermore, adopting the Weyerhaeuser case it would seem that the decision in that case would necessitate the affirmance of the Secretary of the Interior's final decision in the cases at bar because in that case Chief Justice White said this:

> "The matter being within the jurisdiction of the Secretary of the Interior, we must assume that the facts necessary to establish the right to approve the selections were shown to his satisfaction." Page 265, L. ed.

Adopting the same reasoning and the same law in this case would necessitate the affirmance of the Secretary's final decision of February 17, 1910, because, as said in the Weyerhaeuser case, supra, "we must assume that the facts necessary to establish the right to approve the selections were shown to his (the Secretary's) satisfaction."

It will be noted that very great weight was given by Chief Justice White to the decision of the Secretary of

the Interior and it is patent from a reading of the Weyerhaeuser case that Justice White was mindful of that expresion so often seen in the reports of the Supreme Court of the United States that the decisions of the officers of the Land Department of the United States will not be reversed, or their construction of statutes committed to them for execution disturbed, except for the most cogent reasons. This doctrine of the Supreme Court, it is submitted, should be kept steadily in mind in this case, because the courts are being asked to reverse the decision of the Secretary of the Interior in a case arising under a law of Congress committeed to him for administration. It practically asks the courts to reverse the Secretary's decision upon both the law and the facts, since it would be impossible to segregate the fact from the law matter in his decision, and it is further submitted that the decision of the Secretary of the Interior upon questions of fact are conclusive upon this court (Johnson vs. Townsley, 20 L. ed., 485; Shepley vs. Cowan, 23 L. ed., 424, and cases heretofore cited on this proposition of law in this brief), as are likewise its decision of mixed questions of law and fact (Quimby vs. Conlan, 26 L. ed., 800; Whitcomb vs. White, 53 L. ed., 891).

Weyerhauser vs. Hoyt, supra, was decided February 20, 1911, and on the same day the Supreme Court rendered its decision in Roughton vs. Knight, found at page 326 of Volume 55 L. ed. (219 U. S., 537). If it was intended in any way to depart from the law established in Cosmos Exploration Co. vs. Gray Eagle Oil Co., supra, the Supreme Court failed to indicate its intention of so doing. On the contrary, Roughton vs. Knight expressly affirms

the Cosmos case and expressly recognizes the dictrine laid down in the Cosmos case to the effect that no equitable or other right is acquired by the selector under the Act of June 4, 1897, by the mere presentation of the application at the local land office, and it recognizes the fact that before any rights accrue the selector must comply with rule 18 of the Regulations of June 30, 1897, promulgated by the Secretary of the Interior to administer the said Act of June 4, 1897, and found in 24 L. D., 592. The two cases of Weyerhaeuser vs. Hoyt and Roughton vs. Knight being decided on the same day by the Supreme Court and the Cosmos case not being even adverted to in the former and expressly affirmed and followed in the latter would seem to be conclusive evidence of the fact the Cosmos case was regarded as good ~~as~~ law on that date.

In Roughton vs. Knight, supra, Roughton, in June, 1899, filed his relinquishment, abstract, etc., of the land he owned in the forest reserve and the papers in the case were forwarded to the Commissioner of the General Land Office in the same month, but Roughton did not make his selection of the lieu lands till after the repeal of the Act of June 4, 1897, and the acts amending the same, dated March 3, 1905 (33 Stat., 1264). After the repeal he attempted to acquire title to government land outside the forest reserve by making selection of it, averring that he had acquired a vested interest or right to the lieu land. Justice Lurton states that Roughton had not entered into any contract with the Secretary of the Interior prior to the repealing act heretofore referred to, thereby apparently recognizing the fact that before a contract of exchange of real estate under the forest lieu act could be perfected or consummated, ap-

proval by that official or the Commissioner of the General Land office, who is immediately under his direction and supervision, was requisite and necessary. During the course of his opinion, at page 327, L. ed., he states:

> "That there was no such contract is evident from a consideration of the character of the exchange provisions and the regulations adopted by the Secretary of the Interior, prescribing the method of carrying out the act. Upon its face the act is neither more nor less than a proposal by the government for an exchange of claims to land unperfected, or lands held under patents, situated within the exterior lines of a forest reservation, for an equal area of public land subject to entry elsewhere * * * * But the act did not prescribe the method by which one so situated might avail himself of the proposal. It was therefore competent for the Land Department to adopt rules and regulations for the administration of the act in this particular, and this was done, and those rules are found in 24 Land Dec. 592,593."

> "In Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S., 301, 309, 47 L. ed., 1064, 1070, 23, Sup. Ct. Rep. 692, these regulations are referred to as reasonable and valid rules 'entitled to respect and obedience.' The regulations which have a bearing here are rules 14, 15 and 16.

> "To take advantage of the proposal contained in this act, the applicant must select the land he wishes to receive in lieu, and file a sufficient relinquishment of land within a forest reserve. Manifestly there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency,

and an assent to the particular selection made in lieu.

"It was not unreasonable that, in the administration of this act, the Land Department should limit the authority of any official to accept a relinquishment. As far back as April 14, 1899, the Secretary of the Interior construed the act and made the regulation before mentioned."

It is submitted that the above establishes that before a contract of exchange can be consummated for lands within for lands without a forest reserve it is necessary for the selections to be approved by the Interior Department, and not by the local land officers. As heretofore stated, the act required quite elaborate machinery in the way of regulations to properly administed it. The act provided for the exchange only and the Secretary of the Interior and the Commissioner of the General Land Office promulgated rules and regulations for carrying the act into operation. This authority, while not granted to the Department of the Interior in express words, was necessarily implied because Congress provided what should be done under the act and committeed the doing of it to the Land Department. The Land Department promulgated the rules and regulations of June 30, 1897, 24 L. D., 592, and the constant ruling in that department ever since the date of said regulations has been to the effect that one could asquire no rights in and to the land applied for under the selection until approval by the Commissioner of the General Land Office, and that the mere offering of the application at the local land office created no vested or other rights that would preclude entry

by any citizen of the United States until the final consummation of the selection by its acceptance by the Commissioner at Washington, D. C. See Kern Oil Co. vs. Clarke, 31 L. D., 300; Miller vs. Thompson, 36 L. D., 492; C. W. Clarke, 32 L. W., 235; and Thomas B. Walker, 36 L. D., 496.

In the last mentioned case above, at pages 496 and 497 of the 36th Land Decisions, there appears the following:

> "Jurisdiction of the Land Department over an application under this law does not cease until at least an equitable title has vested in the applicant. Such title is not created by the mere filing of the application. In Cosmos Co. vs. Gray Eagle Oil Co. (190 U. S., 301, 312), the Supreme Court, discussing this question, said:
>
> " 'There must be a decision made somewhere regarding the rights asserted by the selector of land under the act, before a complete equitable title to the land can exist. The mere filing of papers can not comply with and conform to the statute, and the selector can not decide the question for himself.'
>
> "And after further discussion it is said (p. 313):
>
> " 'It is certain, as we have already remarked, that there must be some decision upon that question before any equitable title can be claimed—some dedecision by an officer authorized to make it. Under the rule above cited that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it.'
>
> "The rule referred to is rule 18 of Rules and Regulations Governing Forest Reserves, approved June 30, 1897 (24 L. D., 589, 592), which reads:

> "'All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with report as to the status of the tract applied for.'
>
> "Here your office has come to no conclusion as to the rights of the applicant, and hence equitable title has not vested in him."

Again, in C. W. Clarke, 32 L. D., 235, Secretary Hitchcock made these statements during the course of his decision:

> " * * * * Under the exchange provisions of the Act of June 4, 1897, the land department acts administratively to accept for the United States the title tendered to lands offered in exchange and assigned as base for selections, and may make any objection to the title tendered that a private individual might reasonably do in a similar transaction of exchange. The United States as one of the parties to the exchange is represented by and acts through the land department. It was held in H. H. Goetgen (32 L. D., 209) that:
>
> "'If it is disclosed by the abstract, or in any other manner, that adverse claims exist the land department cannot try the question which claimant has the better title or right. Such a controversy must in some manner be terminated before a title from either claimant can be accepted as a base for selection of public land under the exchange provisions of the act.'"

Practically the same situation existed in the cases above quoted from as existed in the cases at bar during the long

years in which they were litigated before the Interior Department; that is, when the applications were presented, as shown by Exhibit "A" attached to the amended bills, at page 20 in the transcripts, the land embraced in the cases at bar were covered by State Indemnity School Selection Lists Nos. 178 and 188, and no equitable right could be accorded the would-be selector till these School Selections were disposed of and deleted from the land office records. Before that was done, and long before any officer authorized to consummate the selections under the law approved them, these defendants made homestead and timber and stone filings on the land which have since regularly gone to patent.

See Secretarly's Decision of Feb'y 17, 1910, at page 20, Transcript.

The plaintiff's case is not nearly so strong as the plaintiff's case in the Cosmos case, because in the Cosmos case the selector's application was placed of record at Visalia, California, land office, and even then the Supreme Court held that adverse rights intervening between the date the selections were so placed of record and the date of the final approval of the selections by the Commissioner of the General Land Office, took precedence over the selections. Here plaintiff's Exhibit "A" attached to his amended bills, and appearing at page 20 of the transcript, shows that the selections were never entered in the records of the Lakeview, Orgon, land office. If entries intervening between the date of record and date of final approval in the Cosmos case took precedence over the selections surely the entries in the cases at bar which were made both before entry of record or approval by the Commissioner, should give the defendants the perfect right to the land and

deprive the plaintiff of any vested or other rights to the same.

It should not be forgotten, when this case is decided, that Mr. Daniels has not lost the base land upon which these selections were based. See Maybury et al. vs. Hazeltine, 32 L. D., 41; and La Fayette Lewis, 33 L. D., 43; Fred A. Kribs, 37 L. D., 142.

In Fred A. Kribs, 37 L. D., 142, above, Kribs was assignee of a soldier's additional right of entry of public lands, and attempted to locate such additional right upon lands in the Duluth, Minnesota, land district. The application was rejected because of defect in the base, and the case was closed. Kribs applied to have his papers (the assignment, etc.) returned to him and the Commissioner of the General Land Office refused to do so. Upon appeal the Secretary of the Interior said:

> " * * * * The possession of these papers by the United States is in principal no different from the possession of a deed and abstract of title delivered in proposed exchange under the act of June 4, 1897 (30 Stat., 36). The papers are not a record or property of the United States evidencing a transaction of disposal of public lands. The United States has parted with or given nothing upon faith of them. The vendor in a transaction of sale or exchange obviously can not hold both that which was to be received and what was to be given as its equivalent—the thing and the price. He must convey, or on failure of the transaction he must return what he has received. William E. Moses (33 L. D., 333). He has no clai mto both merely because at failure of the negotiation he had possession of both."

See, also, Clearwater Timber Company vs. Shoshone Co. 155 Fed., 612; Smith vs. State of Idaho, 40 L. D., 554, to the same effect.

The fact of the ownership of the base land by the selector is further evidenced by the fact he must pay taxes upon it until the exchange is finally consummated by approval by the Commissioner of the General Land Office. Clearwater Timber Co. vs. Shoshone Co., 155 Fed., 612; Smith vs. State, 40 L. D., 554; La Fayette Lewis, 33 L. D., 333; Maybury vs. Hazeltine, 32 L. D., 41, 42; 33 L. D., 501.

> "And in some case a man shall have by the grant of another a fee simple, fee tail, or freehold without livery of seisin. As if there be two men, and each of them seised of one quantitie of land in one countie, and the one granteth his land to the other in exchange for the land which the other hath, and in like maner the other granteth his land to the first grantor in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in exchange, without any livery of seisin; and such exchange made by proll of tenements within the same county without writing is good enough." Co. Litt., Tit., Exchange 50a, sect. 62, Butler and Hargrave's Notes.
>
> "To shut up this point there be five things necessary to the perfection of an exchange. 1. That the estates be equal. * * * * 3. That there be an execution by an entry or claime in the life of the parties as hath bin said. 4. That if it be of things that lye in grant, it must be by deed. 5. If the lands be in severall counties, there ought to be a deed indented, or if the land lye in grant, albeit they be in one county."
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> Id., 51b., secs 64, 65.

The Forest Lieu Act of June 4, 1897, contemplated a common law exchange as given above; that is, an exchange of lands for lands—an exchange of equal estates, which was not consummated till both parties assented thereto, nor till "there be an execution by entry or claime in the life of the parties as hath bin said" in the third requisite above. The United States being the owner of the lands to be taken in exchange for the lands relinquished, it stands to reason that its assent to the exchange could not be presumed a priori and before it had any opportunity to inspect the estate and title thereto tendered in exchange. This was a function requiring a high degree of ability and discretion, and the Land Department, which had complete jurisdiction of the matter, committed it to the Commissioner of the General Land Office to consummate all contracts of exchange, and devolved the duty upon him to see that a fee simple estate, free from all incumbrances and adverse claims, should be tendered by the selector in exchange for the public land without the forest reserves. As said, this duty devolved upon the Commissioner a great responsibility which required a greater degree of ability than that possessed by the average local land officer. Not only had the abstract to be examined and checked against the laws of the particular state, but the non-mineral affidavit, the non-occupancy affidavit, and various and sundry other matters had to be passed upon, in a judicial way, before the Commissioner could definitely determine whether or not it would be proper for the United States to enter into and consumate the exchange contract.

Cosmos Exploration Co. vs. Gray Eagle Oil Co., supra;

Instructions, June 30, 1897, 24 L. D., 589, 592; Roughton vs. Knight, supra.

Counsel for appellant, at page 48 of their briefs in the various cases at bar, make this statement:

> "Furthermore, the Secretary's final holding in this particular was not only in direct conflict with the holding of the Supreme Court as just cited, but in direct conflict with his own prior holdings and rulings in approving the selections in question on two different occasions."

I have heretofore attempted in this brief to direct the attention of the Court to the fact that the decisions of May 15 and 18, 1907, wherein the Honorable Secretary of the Interior found in favor of the appellant in the cases at bar, were rendered upon a purely ex parte showing, and a motion for re-review was made soon after said decisions were rendered, as a result of which the Secretary directed the Commissioner of the General Land Office to notify all persons interested in the lands embraced in such ex parte proceedings to show cause why their entries, claims, selections and filings should not be cancelled, and the Register and Receiver of the United States Land Office at Lakeview, Oregon, in pursuance of directions from the Commissioner of the General Land Office so to do, notified all these appellees, entrymen, to show cause why their entries should not be cancelled for conflict with appellant's forest lieu applications. Pursuant to this notice all the parties appeared at Lakeview and other places, May 28, 1908, either personally or by attorney, and presented their evidence to sustain their respective contentions, and as a result of the

adversary proceeding thus initiated the decision of the local officers went for the settlers and timber and stone entrymen, and thereafter the appellant herein never was favored by another decision in his favor by the Honorable Secretary of the Interior. The only Secretary's decision he ever received was that rendered on the purely ex parte showing prior to the adversary hearing of May 28, 1908. After that time he never received a decision at the Secretary's hands, but on the contrary, by the Secretary's decision of February 17, 1910, commencing at page 20 of the various transcripts in the cases at bar, the Secretary, after having mulled over the cases for eight (8) years, rendered a most able, exhaustive and careful opinion, in which he awarded the lands to the settlers and claimants. Subsequently this latter decision was attempted by the appellant in these cases to be reviewed and the same was reviewed by the Secretary and he adhered to his former opinion, as shown by the decision of February 17, 1910, found at page 20 of the transcripts. The statements in this brief following the last above quotation are each and every one borne out conclusively by the opinion of the Secretary of the Interior dated February 17, 1910, commencing at page 20 of each of the transcripts, and it further shows that, contrary to the statements made in appellant's brief to the effect all the allegations of the amended bills of complaint are admitted, such allegations were not admitted at all, and for this reason: There are allegations in the amended bills to the effeit that lieu selections were made by Daniels in each of the suits at bar, but these allegations are contradicted and rendered nugatory by the Secretary's decision of February 17, 1910, attached to each bill as an exhibit and

incorporated in and made a part thereof, which said decision shows conclusively that the selections were never accepted or placed of record in the records of any office in the Interior Department. Thus it is clear that appellees do not admit that valid selections were made; nor do they admit that the title tendered by Daniels to the Government was in all respects regular, for this was never determined by the Commissioner of the General Land Office, as shown by said decision of the Secretary dated February 17, 1910. The situation is this: If the allegations in the bill proper should be admitted it would be an implied denial of the statements contained in the Secretary's decision of February 17, 1910, because in conflict with it, it being a part of the amended bills.

In the last paragraph of appellant's brief a request is made that "these questions and propositions of law be certified by this Court to the Supreme Court of the United States as provided by section 239 of the Act of March 3, 1911, 36 Stat. at L., 157." Solicitor for Leonard. Wakefield, Bernhard and Howard does not care to enter any particular obpection to this request, but it is respectfully submitted that the section of the act referred to contemplates the certification only of questions purely of law upon which the Circuit Court of Appeals enterains a doubt. It is thought by solicitors for appellees that there can be no reasonable doubt in the minds of the Circuit Court of Appeals as to how the questions presented upon this appeal should be decided, and it is, therefore, thought that no certification will be found necessary. Furthermore, it is thought that a whole case cannot be certified up as is attempted to be done in this case, but only specific points of

law. Felsenheld vs. U. S., 186 U. S., 134; Dennistoun vs. Stewart, 18 How., 565. And again, the proceeding by certification is not designed to subserve the office of an appeal which a certification as prayed in appellant's brief would do. Segafus vs. Porter, 85 Fed., 689; Am. Land Co. vs. Zeiss, 219 U. S., 47, 55 L. ed., 82, and the certificate must contain but a single question or proposition of law, Id., and Quinlan vs. Green County, 205 U. S., 210. A clear doubt must exist in the minds of the court before the questions will be certified. Wall vs. Cox, 181 U. S., 244.

All of which is respectfully submitted.

J. H. CARNAHAN,

Solicitor for Appellees Leonard, Wakefield, Bernhard and Howard.